

UNIVERSITY OF CAPE TOWN

LAW FACULTY

A dissertation submitted in partial fulfilment of the requirements for the

Masters of Law (LLM) in International Trade Law

An Examination of whether the Protection of Investment Act represents a successful alternative to Bilateral Investment Treaties

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STATEMENT

This Dissertation is presented for the approval of the Senate in fulfilment of part of the requirements for the *LLM International Trade Law* in approved courses and a minor dissertation. The other part of the requirement for this qualification was the completion of a programme of courses.

I hereby declare that I have read and understood the regulations governing the submission of *LLM International Trade Law* dissertations, including those relating to length and plagiarism, as contained in the rules of this University, and that this dissertation conforms to those regulations.

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CHAPTER 1: INTRODUCTION

I. AIM

The aim of this thesis is to examine whether the Protection of Investment Act¹ (**POI Act**) is a practical and suitable alternative to the bilateral investment treaty (BIT) regime. It will be argued that the POI Act represents a missed opportunity for South Africa to develop a holistic BIT policy based on reciprocity, and as such fails as a viable investment protection alternative.

II. BACKGROUND/CONTEXT

South Africa has been undergoing a difficult and lengthy process of change in the regulation of its foreign investment. From a period where the BIT reigned supreme, we have now seen this reign come to an end, with the ouster being the much debated national protection of investment regime, in the guise of the Protection of Investment Act No 22 of 2015 (which was signed into law by the president of the Republic of South Africa on 13 December 2015).

As is typical with most significant changes of the *status quo*, the move away from BITs has been met with much uncertainty and consternation, and even outright objection from trading partners (and their host countries) and civil society alike. So controversial has been the proposal of a national investment protection regime that applies equally to South Africans and foreigners alike, that some trading partners have threatened to move their business away from South Africa to other, more ‘investor-friendly’ nations. According to a statement released by the Democratic Alliance, South Africa’s official opposition party, on the Protection and Promotion of Investment Bill²:

‘All of us know that this is a bad bill. How do we know? Because foreign investors told us. Every foreign investor that came to our committee told us in unambiguous terms that if this bill passes, they will be less likely to invest in SA. More than 80% of all foreign investors in SA, representing an enormous R2-trillion in investment over the past 20 years, told us that this is a bad bill.’

This so-called ‘bad bill’ was published in the official Government Gazette on 15 December 2015.³ Barring a constitutional challenge, the POI Act will remain part of South African law in its current form.

¹ Act No 22 of 2015

² As it was then known. This statement was reported in BDLive on 17 November 2015, before the Bill was passed into law. Author unknown ‘DA calls for rethink of investment protection bill’ available at <http://www.bdlive.co.za/business/trade/2015/11/17/da-calls-for-rethink-of-investment-protection-bill>, accessed on 30 April 2016

³ Government Gazette No 39514, Volume 606

In order to understand what all the fuss about the POI Act is, it is necessary to first understand the international investment regime that pre-dated it, in the form of BITs.

Of course, simply understanding the impact of the new legislative provisions in respect of investment protection would not be sufficient to understand why this change has been met with such robust lobbying and resistance, from when it was first proposed in 2013 right until before the promulgation of the Act (as evidenced in the statement by the official opposition party quoted above and various media statements by investors and interested parties)⁴ and even thereafter. In order to truly understand the impact of this new regime of investment protection, one must first understand the state of affairs under the BIT regime and why the move away from BITs was perceived as crucial for South Africa (i.e. one must conduct a comparison of the state of affairs under BITs and compare this to the legislative mechanisms to alter this status quo as set out in the POI Act, together with an understanding as to why this was perceived as a necessary policy response).

III. STRUCTURE OF THE DISSERTATION

This chapter sets the scene for the question under examination in this thesis. Chapter 2 briefly explores the history and development of BITs, in order to demonstrate the economic and legal rationale for the development of these instruments for protection of investments between States. Once there is a general understanding of the background to these investment protection instruments, Chapter 3 will examine the standard clauses contained in the BITs entered into by South Africa to date, through a desktop review of publically available BITs. Chapter 4 will then introduce one of the main catalysts for a review of the BIT regime, the *Foresti* arbitration, through which a group of Italian and Luxembourgish investors alleged that, through legislating various affirmative action measures to redress apartheid injustices, South Africa had violated specific BIT obligations, namely protection against expropriation, fair and equitable treatment for foreign investors and national treatment standards. In the course of Chapter 4, the author will examine the BIT claims relied on by the Claimants against South Africa during international arbitration, and briefly summarise South Africa's responses to these claims. Chapter 5 will then focus on the BIT review undertaken by South Africa, which was largely necessitated by the elements in dispute in the *Foresti* arbitration and its unsatisfactory outcome. Chapter 5 will highlight some of the perceived limitations and objectionable clauses contained in BIT's, together with the Department of Trade and Industry's (DTI) BIT macro

⁴ Linda Ensor 'Business raises alarm over investment bill' Business Day Live 19 February 2015, available at <http://www.bdlive.co.za/business/2015/02/19/business-raises-the-alarm-over-investment-bill>; Babalo Ndenze 'Parliament warned that Investment Bill will scare off investors' Sunday Times 16 September 2015, available at <http://www.timeslive.co.za/sundaytimes/stnews/2015/09/16/Parliament-warned-that-Investment-Bill-will-scare-off-investors>; Peter Draper and Azwipheleli Langalanga 'Does the draft investment bill threaten foreign investors' rights?' 2 April 2014 available at <http://www.saiia.org.za/opinion-analysis/draft-investment-bill-requires-amendment>; Natalie Greve 'Germans warn of investment retreat following signing of investment bill' Engineering News 28 January 2016 available at [germans-warn-of-investment-retreat-following-signing-of-investment-bill-2016-01-28](http://www.enr.com/news/germans-warn-of-investment-retreat-following-signing-of-investment-bill-2016-01-28). All websites listed were accessed on 30 April 2016.

and micro policy recommendations, which eventually culminated in a decision by the Cabinet of South Africa that South Africa should cancel and/or not renew the historic BITs it had entered into, but rather replace these treaties with a holistic investment protection regime, applicable to both South African and foreign investors alike, to be ushered in through the POI Act. Chapter 6 will then provide a substantive assessment of the POI Act and its likely impact, the purpose of which will be to examine whether the POI Act, objectively, provides satisfactory responses to the limitations highlighted in the DTI BIT review. If this is the case, then the POI Act may be considered successful, and may represent a suitable alternative to the problematic BIT regime, which may be replicated in other jurisdictions. In order to do so, and once the perceived limitations in the BIT approach have been identified and also the policy concerns that have arisen through earlier chapters explored, Chapter 6 will then include a clause by clause analysis of the POI Act in order to determine whether this legislation could resolve the issues that have arisen under the BIT regime. Chapter 7 will discuss the POI Act (its successes, any notable omissions and apparent flaws) by evaluating the POI Act against the foreign investment policy aims detailed in the DTI BIT Policy Framework Review in order to determine whether there are any apparent limitations in the text of the POI Act in meeting the objectives set out in the trade policy review (this is of course limited to a textual review as no jurisprudence has yet developed in interpreting the meaning of the provisions of the POI Act). Based on the discussions set out in Chapter 7, the author will then set out her conclusions in relation to the question under investigation.

IV. SCOPE OF INVESTIGATION

Throughout this thesis, the focus is on those particular aspects of the BITs that could prevent or limit South Africa from pursuing legitimate public policy objectives – as highlighted in the Government Position Paper entitled *Bilateral Investment Treaty Policy Framework Review* published by the DTI during June 2009 (**BIT Policy Framework Review**), and brought to the fore in the *Foresti*⁵ arbitration. The focus of this review is not on all aspects of BIT's, and a detailed analysis of the macro and micro economic or political rationale for their conclusion, or their efficacy in attracting foreign direct investment, is beyond the scope of this thesis. Our focus will be particularly on those aspects of BITs that may, directly or indirectly, impact on South Africa's right to pursue legitimate policy objectives (particularly in regard to human rights considerations) due to specific BIT limitations. The purpose of the examination of the *Foresti* arbitration proceedings initiated under South African BITs is to serve as an example of the inroads into the policy sphere that BITs may cause.

Of course, for much of the same reasons as apply to South Africa (which will be elaborated on in later chapters, but including uncertain business environments and wanting to foster investor

⁵ This is a reference to the international arbitration initiated by Piero Foresti *et al* against the Republic of South Africa, which is explored in more detail in Chapter 4 below.

confidence to invest, desire to be regarded as part of the community of nations and to be regarded as a jurisdiction friendly towards foreign investment), many other developing, and particularly, African countries, have entered into similar BITs the terms or application of which may also be problematic for these developing countries. In this paper, the author will examine whether protection of investment (as represented through the POI Act) can be a workable, and very importantly, sustainable alternative to BIT's for these countries as well. Based on the findings set out in Chapter 5, the author will then be in a position to opine on whether a national protection of investment regime, as represented in the POI Act, could represent a viable alternative to the current BIT regime, which could be exported to other nations.

CHAPTER 2: THE HISTORY AND DEVELOPMENT OF BITS

I. INTRODUCTION

There is a multitude of scholarly articles that describe in great detail the history of BITs and their process of development as a tool to regulate foreign direct investment. It will not be possible to set out detailed explanations of all these accounts, and the author will instead summarise the position, based on the literature reviews conducted.

II. PRE-1994

South Africa had no history of negotiating BITs before 1994, subsequent to which there was a flurry of conclusion of these treaties by the democratically elected government. At least 27 BITs were concluded during the African National Congress' first term in power — commonly referred to as first-generation BITs — and it is believed that this was largely to demonstrate that the 'New South Africa' was open for business as an investor-friendly destination.⁶ However, by the time that South Africa started concluding BITs, BITs had already been a common means to regulate and protect foreign investment worldwide and represented the '*dominant international vehicle through which investment was regulated*'.⁷

III. COMMERCIAL RATIONALE FOR BITS

For as long as there has been a flow of investments across borders, there has been a need to protect these investments, in the interests of all parties. Without oversimplifying the complicated journey towards BITs, BIT arose to enhance the (largely commercial) interests of the following parties — the *investor* having ploughed capital into a project in a third country seeks a return, the *capital importing country* has an interest in encouraging the investment into its country, whilst the *capital exporting*

⁶ See the DTI BIT Policy Framework review which leads with the assertion that '*the democratically elected government of the time had to demonstrate that the [Republic of South Africa] was an investment friendly destination...*', at page 5.

⁷ Andrew T. Guzman, 'Why LDCs Sign Treaties That Hurt Them: Explaining the Popularity of Bilateral Investment Treaties', 38 Va. J. Int'l L. 639 (1997), at page 640.

country seeks protection of its nationals and their investments in other states. Prior to the entry into of BITs, international standards relating to the regulation of foreign investments was uncertain, and no rule of customary international law existed in relation to the protection of these investments, nor in relation to the standards of compensation that would apply in the case of expropriation of investments.⁸ In the face of this uncertainty, BITs provided welcome legal clarity.

BITs represent a contractual agreement between home⁹ and host states¹⁰ that govern all matters relevant to the regulation of investment flowing between those states, and created certainty and clarity as to the rules that would apply to the investment as well as the standards of treatment that would apply to the investor, without the need to have recourse to opaque principles of customary international law. BITs served to regulate the standards of behavior that would apply, and that an investor of a home state was entitled to expect from the host state in which it had invested. In addition to setting the standards of behavior that investors were entitled to receive, BITs often also set out the acceptable methods of dispute settlement between investors and host states, in relation to investments caught within the ambit of the BIT. The legal certainty provided by BITs was extremely attractive, such that, by 1996 it was estimated that at least 1000 BITs had been signed and ‘*almost every country on the globe a party to at least one such treaty.*’¹¹

IV. BITS ARE FREELY NEGOTIABLE

Countries, both developed and developing, are free to negotiate and conclude BITs with their trading partners as they see fit and in the exercise of their sovereign powers.¹² Whilst BITs are in principal matters to be negotiated, the rise of standard-form or model BITs meant that, in practice, states would often find themselves negotiating changes to the model format, and not necessarily creating an investment agreement *ab initio*.¹³ BIT’s generally contain clauses regulating¹⁴: the definition of

⁸ Ibid, at page 646 to 665, sets out a good summary of the international journey towards BITs, from disputes relating to expropriation by newly sovereign states, the failure to establish a rule of customary international law relating to the standard of ‘prompt, adequate and effective’ compensation, the adoption of United Nations Resolution 3281 in 1974 (the Charter of Economic Rights and Duties of States) which recognised the right of States to ‘regulate and exercise authority over foreign investment’ and to nationalize or expropriate property against the payment of appropriate compensation, the amount of which may be determined through local dispute resolution mechanisms unless otherwise agreed, and the eventual rise of BITs as the principal means through which states regulated foreign investment.

⁹ In BITs, this refers to the state whose investor has invested into a foreign state.

¹⁰ In BITs, this refers to the state which has received the investment by the home state’s national.

¹¹ Rudolph Dolzer and Margrete Stevens ‘*Bilateral Investment Treaties*’ (1995)

¹² Of course, as with most matters of international law and relations between states, the free exercise of these rights may be curtailed through political pressure by other states or even bullying as a result of an unequal distribution of power between negotiating states. Politics aside, BITs are in principle freely negotiable.

¹³ Op cit note 6, at page 654. Individual countries such as the United States and Canada have both developed model BIT’s, whilst multilateral organisations such as the Organisation of Economic Co-operation and Development have also developed such treaties for use by their members. To date, South Africa does not have any model BITs, but a draft treaty is being developed for use in ‘exceptional circumstances’ under the POI Act.

investments, treatment of foreign investors and their investments in host states (the standards of most-favoured nation and like treatment usually apply), the duration, termination and renewal of the BIT, protection from expropriation and the compensation payable in the event of expropriation, dispute regulation between investors and host states, sunset clauses (periods for which the investment protection set out in the BIT will continue to apply, even after termination of the BIT), and exceptions to the standards of protection set out in the BIT. The impact of some of these standard clauses as contained in the BITs concluded by South Africa will be examined in later chapters.

In line with the global trend of regulating foreign investment through BITs, South Africa concluded a number of such treaties, particularly with European countries.

CHAPTER 3: SOUTH AFRICAN BIT PRACTICES

I. INTRODUCTION

Now that the scene for a discussion has been set, and the global impetus behind BIT's demonstrated, it is necessary to consider some typical provisions of the BIT's that South Africa has concluded to date (the focus for this Chapter is on the treaty provisions themselves, whilst later chapters will analyse possible impacts of these provisions). This review is based on a desktop analysis of the BIT's made publicly available through the United Nations Conference on Trade and Development website (for these purposes, the assumption is that these records are up to date).¹⁵ For review purposes, all treaties that are available in English and have entered into effect (whether or not these may have subsequently been terminated) have been reviewed. This includes BIT's concluded with the following countries: the Kingdom of the Netherlands¹⁶; the United Kingdom of Great Britain and Northern Ireland¹⁷; the Federal Republic of Germany¹⁸; the Czech Republic¹⁹; the People's Republic of China²⁰; the Kingdom of Denmark²¹; the Republic of Finland²²; the Hellenic Republic²³; the Republic of Korea²⁴; the Federal Republic of Nigeria²⁵; the Islamic Republic of Iran,²⁶ the Kingdom of Sweden²⁷ and the Republic of Mauritius²⁸.

¹⁴ Op cit note 10 — The authors conclude that BITs entered into across the world are largely similar in substance.

¹⁵ UNCTAD Policy Hub, South Africa BITs, available at <http://investmentpolicyhub.unctad.org/IIA/CountryBits/195>, accessed on 20 June 2016.

¹⁶ Dated 9 May 1995.

¹⁷ Signed by South Africa on 20 September 1994, instruments of ratification exchanged on 27 May 1998.

¹⁸ Dated 11 September 1995.

¹⁹ 14 December 1998.

²⁰ Dated 30 December 1997.

²¹ Dated 22 February 1996.

²² Copy unsigned, but dated 1998.

²³ Dated 19 November 1998.

²⁴ Dated 7 July 1995.

²⁵ Dated 29 April 2000.

The treaties that did not enter into effect have not been reviewed, as it would be difficult to conclude whether or not the treaty text provided on the UNCTRAL website actually represented final drafts. It would also be difficult to conclude whether the treaty text provided had been acceptable to both parties, or whether the treaty adoption process had stalled for some reason. For these reasons, a review of such treaties may not be reliable for present purposes. Due to language limitations, BITs that were not concluded in English have not been reviewed.

It is interesting to note that, out of the 13 BIT's that have been reviewed, at least 11 of these qualify as 'first-generation' BITs that were concluded during the period between 1994 and 1998 – which seems to give credence to the theory advanced in the by the DTI task team set up to review South African BITs (the review findings are set out in further detail in Chapter 5 below) that the newly-democratic South Africa used BIT's as a tool to open South African borders to the rest of the world.

II. BIT PROVISIONS

Through a review of the relevant BIT's, there are many clauses that are similar, if not identical across BIT's. For the purposes of this analysis, the author will not set out in detail all 'vanilla'²⁹ clauses but only those considered relevant in the context of the review. These vanilla clauses include the definition of investments which is largely similar across all BIT's reviewed (and includes movable and immovable property, shares and other interests in companies, intellectual property rights and business licenses and concessions) and the scope of 'nationals' protected under the BIT's (both natural and juristic persons). The purpose of undertaking this review of BIT's is to ascertain the contractual obligations in relation to foreign investment that South Africa has agreed to, together with the level of standardisation across BITs. Once there is a view on these BIT contractual obligations, this will contribute to a determination as to whether there is a correlation with the problem under investigation – in other words, this will facilitate an examination of whether the BIT provisions as drafted could allow encroachment on legitimate policy space. The aim of this review is to demonstrate whether the terms of the BIT's have contributed to, if not actually created, the problems emphasised in the DTI BIT Policy Review (and detailed in Chapter 5 below).

III. BIT FUNDAMENTALS

As mentioned above, it is essential to first understand the BIT regime before attempting to provide any comment on whether, if at all, and to what extent, the recently promulgated POI Act will have any impact in addressing the 'mischief' perceived in the BITs as determined in the DTI BIT

²⁶ Dated 3 November 1997.

²⁷ Dated 25 May 1998.

²⁸ Undated.

²⁹ This term is used to denote the most basic, common terms across BITs.

Policy Review. Before continuing, it is worth noting a few points in relation to BITs as a legal instrument. First, BITs are reciprocal in nature – every protection is provided to both treaty parties equally. Second, even though BITs are concluded between sovereign states, the BIT protections are provided to nationals of each state, and not to the state itself. On the face of it, BITs are drafted between sovereign nations who should (theoretically) find themselves in equal bargaining positions. However, BIT's are actually drafted on the basis that there is an inherent inequality for the foreign national investing in a host state who may otherwise be subjected to the whims of a host state, to its detriment. The result is that the BITs are tipped heavily in favour of nationals, and host state power to deal with investments is often restricted by BITs. It is also important to bear in mind that, even though BIT protections are reciprocal, realistically, it is the capital importing party, the host state, that will be required to provide the BIT protections to nationals of the home state (capital exporting country).³⁰

See table A setting out some of the salient provisions across South African BITs, which are relatively standardised across most BITs. For this table, those specific provisions that were referenced in the *Foresti* review and subsequent DTI BIT Policy Framework review have been extracted (Chapters 4 and 5 below respectively). Table A highlights the following standard provisions across all 13 BITs reviewed: retrospective applicability, fair and equitable treatment, most favoured nation treatment, protection from expropriation, standard of compensation for expropriation, applicable exceptions, dispute settlement and any applicable sunset clauses.³¹ Table A will be referenced in later Chapters.

CHAPTER 4: THE *FORESTI* ARBITRATION – THE BEGINNING OF THE END FOR SOUTH AFRICAN BIT'S

I. INTRODUCTION

The author has briefly set out above some explanations for the development of BITs globally, together with a précis of some of the standard clauses commonly featured in South African BITs. The author now turns to address the impact of the conclusion of two specific BITs on South Africa, which came to the fore through international arbitration in 2007. The relative standardization across BITs, as reflected in Table A, means that it is logically permissible to impute these impacts to all other South African BITs containing similar (if not identical) clauses as those in dispute in the *Foresti* arbitration.

³⁰ In the modern investment landscape it is possible that in any BIT relationship, parties act as both capital importers and exporters *vis a vis* each other. In most developing countries however, the developing country is typically the capital importing country, required to provide protections to foreign nationals.

³¹ Sunset clauses in BITs govern the period for which the contract will remain valid after termination i.e. the period for which the contract will subsist even after termination, typically to cater for the longer term duration of investment projects.

II. *FORESTI* BACKGROUND

On 8 November 2006, the International Centre for Settlement of Investment Disputes (ICSID) received a request for the institution of arbitration proceedings under the Additional Facility Arbitration Rules from certain Italian and Luxembourgish investors (**the Claimants**) against South Africa (which will be referred to as **the *Foresti* arbitration** throughout this thesis).³² The proceedings were based on an alleged breach by South Africa of the BITs it had entered into with Italy³³ and with the Belgo-Luxembourg Economic Union respectively.³⁴ The crux of the Claimants' claim was the alleged expropriatory effect of South Africa's Mineral and Petroleum Resources Development Act, Number 28 of 2002 (**MPRDA**), which required, amongst other things, that mining companies operating in South Africa achieve 26 per cent ownership by historically disadvantaged South Africans.³⁵ South Africa (the Respondent in the arbitration) argued that, even if there had been expropriation of the mining rights held by the Claimants (which it disputed), this was taken for important public purposes unique to the South African landscape.³⁶ Of particular interest in this matter was the filing of submissions by non-disputing parties (which was authorized by the arbitration Tribunal) which focused on the human rights implications of the claim (which will be elaborated on in further detail below). A detailed review of the Claimants' and Respondents submissions is not appropriate (or necessary) for present purposes, however, it will be useful to sketch a brief background of this arbitration and the final award rendered in order to understand the impact that this arbitration had on South Africa's approach to BITs and the investment protection snowball that it set in motion.

III. THE CLAIM

The Claimants alleged in their memorial that, through South Africa's adoption of a raft of legislative and regulatory changes in the mining sector (including the MPRDA and the Mining Charter), the following breaches of South Africa's BITs with Italy and the Belgo-Luxembourg Economic Union occurred:

³² The Claimants were Italian nationals, the Foresti and Conti families, and Finstone s.à.r.l, a company incorporated in Luxembourg. See the award for this arbitration, ICSID Case No ARB(AF)/07/1, published on 4 August 2010, which sets out a synopsis of this matter, from the initial request to the handing down of the award.

³³ Entered into on 9 June 1997.

³⁴ Entered into on 14 August 1998.

³⁵ The Mineral and Petroleum Resources Development Act was part of a number of legislative measures designed to address the systemic inequality and devastating legacy caused by apartheid legislation, and formed part of South Africa's broad-based black economic empowerment strategy. See the DTIs publication 'South Africa's Economic Transformation: A Strategy for Broad Based Black Economic Empowerment', available at https://www.thedti.gov.za/economic_empowerment/bee-strategy.pdf, accessed on 1 July 2016. The term 'historically disadvantaged persons' refers to Black African, Coloured and Indian persons who were disadvantaged under the apartheid system of racial inequality and economic segregation.

³⁶ This included ameliorating the disenfranchisement of historically disadvantaged South Africans who were largely excluded from the South African economy and other negative effects of apartheid policy, and also reducing the economically harmful concentration of mineral rights in a small percentage of the (white) population. See Respondents *Objections to jurisdiction and admissibility and Counter-Memorial on the Merits*, Case No ARB(AF)/07/1 (Respondent's countermemorial) para 562, 57-122, and 561.

- the common law mineral rights leased/owned by the Claimants' operating companies in terms of the previous legal regime had been expropriated (either directly or indirectly) through the introduction of a requirement to apply for a license to continue mining where these 'old order'³⁷ mining rights were held (the MPRDA introduced a system of State custodianship of natural resources, which required a license from the State to undertake mining activities. All 'old order' mining rights were required to be updated and licenses applied for within a certain period, in order to continue mining activities). This breached the protections against expropriation included in the BITs;
- the introduction of a requirement that historically disadvantaged South Africans should hold at least 26 per cent equity in mining companies amounted to an expropriation of the Claimants shares in the operating companies that were conducting the mining activities, in violation of the BIT protections against expropriation (as this requirement effectively meant that the Claimants would have to be divested of part of their shareholdings in local mining companies in order to comply with the MPRDA and Mining Charter);
- The favourable treatment accorded to historically disadvantaged South Africans under the MPRDA and Mining Charter was a breach of the national treatment obligations contained in the Italy³⁸ and Belgo-Luxembourg³⁹ BIT's;
- the provisions relating to fair and equitable treatment and national treatment in the referenced BITs had been breached. Under this claim, the Claimants put forward a number of assertions to support their claim that the fair and equitable treatment provisions had been breached.
 - First, the Claimants alleged that the MPRDA and the Mining Charter were 'blunt instruments' that were not sufficiently tailored to the unique circumstances and peculiarities of the Claimants business (a family business operating within the dimension stone industry), with the result that compliance by the Claimants business would be objectively impossible.⁴⁰
 - The Claimants argued that historically disadvantaged South Africans had been treated more favourably under the new mining legislation and that foreign investors had been

³⁷ Used in the MPRDA to refer to those mining rights held under the terms of previous legislation (prior to the MPRDA) or the South African common law.

³⁸ Each party must '*offer investments and returns of investors of the other Contracting Party no less favourable treatment than that accorded to investments of its own investors*'. Article 3(1) of the Italy-SA BIT, included as exhibit 17/CA 84 in the Claimants memorial on the merits in the Foresti arbitration ICSID Case No ARB(AF)/07/1 (Claimants memorial).

³⁹ Each party shall '*accord to investments and returns of investors of the other Contracting Party treatment not less favourable than that which it accords to investments and returns of its own investors*' and each party shall '*accord to investors of the other Contracting Party treatment not less favourable than that which it accords to its own investors*'. Article 3(2) and 3(3) of the Belgo-Luxembourg-SA BIT, included as exhibit 17/CA85 to the Claimants memorial.

⁴⁰ Claimants memorial, para 652.

discriminated against.⁴¹ Here, the Claimants also raised an in-principle objection to the application of measures designed to address the legacy of apartheid to their investments, as they argued that they had only invested into South Africa after the unbanning of the ANC and had, as a result, not actually benefitted from any apartheid policies. According to the Claimants, they were not beneficiaries of the apartheid system and as such should not be punished by measures designed to correct the apartheid injustices.⁴²

- the Claimants suggested maladministration on the part of the Department of Minerals and Energy in processing license applications⁴³ and also a lack of transparency and predictability in implementation of the MPRDA.⁴⁴ The Claimants also invoked the most-favoured nation clause contained in both BIT's⁴⁵ to compare the 'fair and equitable treatment' requirements in the Italy and Belgo-Luxembourg BIT to the corresponding provision in the French-South Africa BIT⁴⁶, which read:

'Each Contracting Party shall accord fair and equitable treatment in accordance with the principles of International Law to investments made by nationals and companies of the other Contracting Party in its territory or in its maritime area, and shall ensure that the exercise of the right thus recognized shall not be hindered in law or in practice

*In particular though not exclusively, any restriction on the purchase or transport of raw materials and auxiliary materials, energy and fuels, as well as the means of production and operation of all types, any hindrance of the sale or transport of products within the country and abroad, as well as any other measures that have a similar effect, shall be considered as de jure or de facto impediments to fair and equitable treatment.'*⁴⁷

According to the Claimants, the French BIT extended the scope of the fair and equitable treatment obligations to include a 'positive duty of the State to remove hindrances' whether practical or legal. The assertion continued that, through the application of the most-favoured nation treatment, the Claimants were entitled to this same level of heightened protection as French investors are accorded in terms of the French-South Africa BIT. The Claimants relied on this clause to argue that

⁴¹ Note that this is merely a high-level summary of the salient issues raised by the Claimants. For the full submission see the Claimants memorial.

⁴² Claimants memorial para 716.

⁴³ Claimants memorial para 652

⁴⁴ Claimants memorial para 722

⁴⁵ The Italy and Belgo-Luxembourg BIT's, at articles 3(2) and 7(1) respectively, include the obligation to provide most-favoured nation treatment – essentially entitling Italian and Belgo-Luxembourg investors to more favourable treatment if any other international investors are accorded such treatment through international agreements or BITs.

⁴⁶ Claimants memorial para 655-56, 644 and 735-42

⁴⁷ Articles 3(1) and 3(2) of the France-South Africa BIT, included as Exhibit 17/CA88 of the Claimants memorial

South Africa was obliged to remove legal hindrances to foreign investment, in this case, the MPRDA and Mining Charter.

Notably, the Claimants did not at any stage in their memorial challenge the policy rationale of the MPRDA or the Mining Charter in the context of democratic South Africa (South Africa lead detailed argument on this, which will be covered below).

IV. RESPONSE

South Africa responded to the Claimants claims through a detailed 451-page submission, dated 27 March 2009.⁴⁸ Before responding to each one of the Claimants specific claims in relation to breach of the BITs, South Africa first contextualized the dispute through a thorough examination of apartheid's segregationist and discriminatory policies and their effects in the mining arena, which it argued necessitated the development of the MPRDA and Mining Charter. Although it is beyond the scope of the present thesis to deconstruct the impact of the apartheid policies and subsequent legislative interventions, it is necessary to sketch a high-level overview of South Africa's arguments as to why the regulation of mining and mineral rights (and the introduction of affirmative action measures) should be viewed as a human right in a democratic South Africa.

a) The link between apartheid and mining

Through its submission, South Africa contended that minerals and mining in South Africa were a 'special case'.⁴⁹ Unlike in other countries where mineral rights and mining could simply be regarded as a commercial activity, the deep links between mining and apartheid policies (which weaved a complex web of discrimination and segregation that ensured that an uneducated, disenfranchised, cheap black labour force would be available at the behest of white mine owners), such that '*the mining industry was a direct beneficiary*'⁵⁰ of apartheid policies, merited a different approach.

In its green paper dated 3 February 1998, the Department of Minerals and Energy⁵¹ observed that '*almost all privately-owned mineral rights are in white hands*'. This of course was no coincidence but the result of carefully orchestrated social engineering through a number of pre apartheid policies and apartheid legislation⁵², such as:

⁴⁸ Respondents *countermemorial*

⁴⁹ Respondents *countermemorial* para 7

⁵⁰ Respondents *countermemorial* para 106

⁵¹ The South African government department tasked with regulating mineral rights and mining activities at the commencement of democracy. On 10 May 2009 then newly elected South African President, Jacob Zuma, announced the creation of two new ministries to replace the Department of Minerals and Energy. The two ministries were named Ministry of Energy, and the Ministry of Mineral Resources, respectively. See the website of the department of mineral resources available at <http://www.dmr.gov.za/about-us.html>, accessed on 30 April 2016, which provides more detail on these ministries.

⁵² See Respondents *countermemorial* Chapter IV which sets out in detail these policies, the legislation that implemented them and their evolution and lasting impact.

- Restrictions on land ownership by black people, together with the creation of ‘homelands’ and forced removals of black people from areas designated for white persons;
- With ownership of minerals in the soil being linked to land ownership under the then laws, restrictions on land ownership effectively meant that black people were also restricted in owning minerals and rights to mine them;
- Land ownership restrictions further contributed to the creation of a large migrant labour force, with black people being forced to seek employment away from the homelands (which were unable to support the entire black population) and in the mines;
- The Mines and Works Act No 12 of 1911 allocated predominantly unskilled work to black workers, preventing any skills transfer from white workers and later apartheid legislation ensured that black workers were confined to low-skill and low-paying jobs, and guaranteed that no white worker would ever be subordinate to a black worker;
- Wages for black mine workers were kept significantly lower than those of white mine workers, often below subsistence level;
- Black education policy served to ensure that blacks could not aspire to certain positions within society and also inculcated an inferiority to whites;
- Blacks were not afforded any meaningful political or labour rights.

At Chapter IV of its Counter-memorial, South Africa alleged that the apartheid policies constituted a ‘*grave and continuous breach*’ of the international law prohibition on racial discrimination which the democratic South Africa not only had to discontinue, but also was required to actively remedy.⁵³ The 1993 interim Constitution⁵⁴ and the 1996 final constitution⁵⁵ would lay the domestic foundation to remedy this inequality through the express authorization to take legislative and other affirmative action measures to promote the achievement of equality by persons disadvantaged by unfair discrimination.⁵⁶ South Africa contended that it was thus under a constitutional mandate (in addition to the international law mandate mentioned above) to enact the legislative measures under investigation in the current dispute – the MPRDA and the Mining Charter.⁵⁷

After sketching the consequences of apartheid policy on the mining industry, and the international law and constitutional mandate to remedy these consequences through affirmative action measures, the Respondent answered the Claimants allegations of breach of the BITs. These responses are summarized below.

⁵³ Respondents counter-memorial para 99.

⁵⁴ Constitution of the Republic of South Africa, No 200 of 1993.

⁵⁵ Constitution of the Republic of South Africa, 1996.

⁵⁶ Ibid, section 9(2).

⁵⁷ Respondents counter-memorial para 202-06

b) *Expropriation claims*

The responses to the expropriation claims are dealt with at Chapter X of the Respondents counter-memorial. On South Africa's version, no expropriation of common law mineral rights had occurred as the Claimants and their operating companies factually continued to operate the mining businesses profitably, as they did pre-MPRDA – South Africa stated that they '*continue to exploit the same quarries, carry out the same activities there, and sell the product to the same markets*'⁵⁸ in favour of its argument (in other words, the mere entry into force of the MPRDA was not sufficient to sustain a claim of expropriation as the Claimants' business had continued as usual and there has been no deprivation). Additionally, no expropriation of 26 per cent equity in the operating companies had occurred through a 'compulsory equity divestiture' as argued by the Claimants, and South Africa showed that there were a number of other methods through which the Claimants could have reached the required equity thresholds (in fact, using a beneficiation offset could have reduced the historically disadvantaged South African ownership requirements to just 5 per cent).⁵⁹ According to South Africa, the claim of expropriation of 26 per cent equity was 'speculative at best' given that the Claimants had not explored other allowable means of meeting the equity requirement.

South Africa further alleged that, even if it could have been proven that an expropriation, whether direct, indirect or through equivalent measures had occurred, such expropriation would not have been unlawful in the context of the BIT's.⁶⁰ South Africa argued that both the Italy and Belgo-Luxembourg BIT expressly permitted governments to expropriate investments, provided that the expropriation was made:

- For public purposes or in the national interest;
- In exchange for 'immediate, full and effective compensation'⁶¹ or against 'prompt, adequate and effective compensation'⁶²;
- On a non-discriminatory basis; and
- Under due process of law.

South Africa then set out its detailed arguments as to why all these requirements had been satisfied in the context of the alleged expropriations, thus rendering them lawful in accordance with the terms of the BITs.⁶³

⁵⁸ Respondents counter-memorial para 543

⁵⁹ Respondent's counter-memorial para 660-62

⁶⁰ Respondent's counter-memorial para 559-61.

⁶¹ Italy-South Africa BIT at Article 5(2), Exhibit 17/CA84 to the Respondent's counter-memorial.

⁶² Belgo-Luxembourg-South Africa BIT at Article 5(1), Exhibit 17/CA 85 to the Respondent's counter-memorial.

⁶³ Respondent's counter-memorial para 562-593

c) Fair and equitable treatment claims

South Africa responded in detail to the Claimants allegation of a breach of the standard of fair and equitable treatment. This response included the following submissions:⁶⁴

- The allegation that the MPRDA and Mining Charter was a ‘blunt instrument’ implied that South Africa was required to tailor its regulatory responses to the peculiar circumstances of the Claimants’ business (being a small family business in a particular industry), but there was no international law requirement to do so. However, the inclusion of flexible means through which to satisfy the new MPRDA historically disadvantaged South Africa equity requirements, including a beneficiation offset, meant that the Claimants could elect how they would comply with the legislation, without necessitating a 26 per cent equity divestiture. Further, there was no objective impossibility of compliance for the Claimants (in fact, South Africa lead evidence to show that, in some instances, the Claimants’ operating companies were in fact able to fully satisfy the 26 per cent equity requirement for historically disadvantaged South Africans when they applied for, and were granted, additional new mining licenses – although new mining licenses were not in dispute, but rather the conversion of old order mining rights, it was nevertheless quite telling that the Claimants were factually able to meet the MPRDA equity requirements when they made an effort to do so despite their robust allegations to the contrary);
- In the absence of express promises and undertakings made to investors (of which there were none in the present instance), sovereign States are entitled to deference in their policy choices (manifest unreasonableness excluded);
- The Claimants, through their numerous interactions with the DME, had received ‘significant individualised consideration’;
- The aim of the MPRDA and Mining Charter was not to apportion any culpability for apartheid, hence whether or not the Claimants had, according to their version, benefitted directly or indirectly from apartheid was factually irrelevant (although it was demonstrated through evidence that the Claimants had purchased existing companies that had operated during apartheid and thus had indirectly benefitted from apartheid mining policies);
- The Claimants could hold no objective, legitimate expectation that regulation of the South African minerals sector would not change (the proposal to change mining regulation was one of the first matters that the democratic South Africa had turned its attention to, and numerous proposals had been published and invitations for public comment invited before the final legislative texts had been adopted);

⁶⁴ Respondent’s countermemorial para 668-669 (setting out a summary of the responses) and chapter XI (setting out the detailed responses)

- Regulatory change, however significant, does not conflict with a State's objective to provide a stable and predictable investment environment in terms of the BITs.

d) National treatment claims⁶⁵

South Africa argued that there was no breach of the national treatment provisions through the affirmative action measures in favour of historically disadvantaged South Africans set out in the MPRDA and Mining Charter, as all companies operating in the mining sector wishing to obtain mining rights, whether local or foreign, would be bound by the same generally applicable requirements. Local companies that did not meet the requirements, of which there was a majority, would need to take steps to comply with the new requirements just as foreign companies did. Further, the Claimants were not in 'like circumstances' with historically-disadvantaged South Africans, and South Africa contended that there were legitimate reasons (referring back to the affirmative action measures designed to rectify apartheid inequalities) to differentiate the treatment of the Claimants (being foreigners) from that of historically disadvantaged South Africans.

V. HUMAN RIGHTS SUBMISSIONS

Four non-governmental organisations (both South African and international)⁶⁶ sought the permission of the Tribunal to file written submissions as non-disputing parties ("NDPs") pursuant to the ICSID Rules⁶⁷. When citing the reasons for their petition, the NDP's cited a number of compelling justifications, including that⁶⁸:

- *'the challenged legislation at the centre of the dispute...was enacted in South Africa for important public policy reasons and in furtherance of constitutionally mandated goals' including the 'pursuit of substantive equality' and 'the need to proactively redress the apartheid history of exploitative labour practices, forced land deprivations and discriminatory ownership policies which previously characterized South Africa's mining sector for decades;'*⁶⁹
- The arbitration *'raises important questions concerning...the appropriate line between legitimate, non-compensable regulatory action and compensable expropriation under international law;'* and

⁶⁵ Respondent's countermemorial, chapter XII, para 823-30.

⁶⁶ The centre for applied legal studies, centre for international environmental law, international centre for the legal protection of human rights and the legal resources centre.

⁶⁷ The NDP's relied on Articles 41(3), 27 and 35, and 39 of Schedule C of the ICSID Additional Facility Rules. NDPs Petition for Limited Participation of Non-Disputing Parties under Case number ARB(AF)/07/01 (NDP's petition) para 1.2.

⁶⁸ NDPs Petition para 4.1.

⁶⁹ NDPs Petition para 4.1-2.

- The fact that the arbitration will have important repercussions within South Africa from a policy perspective, as it raises the question of the ‘*international legality of [such] constitutionally mandated measures*’.

To demonstrate the bleak on-the-ground realities of South Africa’s unique post-democracy position, the petition referred to various South African country reports which indicated that black South Africans remained vastly disadvantaged compared to white South Africans after more than a decade of democratic rule; in spheres such as access to education, formal housing, land ownership, access to basic services, education and their earning ability.

The NDP’s argued that it was necessary to have a holistic appreciation of the dispute, and that it was insufficient to consider only the contractual provisions of the BITs in question, without considering other relevant domestic and international law requirements. In addition to a discussion around South Africa’s constitutional mandate to bring about the realization of substantive equality and respect for human rights, the NDP’s went further to sketch a background of the various treaties and conventions under international law which echoed this mandate toward the elimination of discrimination and the requirements to proactively take affirmative action measures necessary to realize such aims.⁷⁰

VI. THE AWARD

The *Foresti* arbitration illuminated the issues that could arise when government parties to BITs undertake major legislative and regulatory developments in matters of national interest, which may conflict with the protections accorded under BITs. The arbitration serves to demonstrate how the provisions of BITs may operate to prevent or limit Contracting Parties’ sovereign rights to develop legitimate policies, even those arising from a constitutional mandate. As was the case here, the arbitration highlighted the juxtaposition of the commercial interests regulated in BITs, with the international law and constitutional imperative to eliminate racial discrimination and implement policies to rectify the effects of racial discrimination.

The subject matter of the arbitration also raised important philosophical questions regarding whether or not it was possible to balance the need for developing countries to encourage and promote foreign direct investment, against the sovereign right to regulate in the national interest (and particularly for the aim of the progressive realization of human rights for all citizens). Of course, the nub of any such debate is the realization that in the case of developing countries, it is often the very presence of foreign direct investments that would contribute to the realization of human rights (by increasing the standard of living of citizens and the support that government is able to provide). Any

⁷⁰ NDPs Petition para 4.5-10.

course of action that served to discourage foreign-direct investment in these instances would thus be an untenable and short-sighted solution. As such, one cannot simply sacrifice foreign investment at the altar of policy, where the ability to pursue that policy may rest of the very returns received through foreign direct investment – a careful balance must therefore be struck between these legitimate, and sometimes competing, aims.

The *Foresti* arbitration succeeded in focusing our minds on both the legal and philosophical arguments, and the delicate relationship between commercial and human rights interests in the context of foreign direct investment into developing countries. What a pity then that this matter was, ultimately, settled by the Parties and no award was made on the merits of either parties' stated case. Unfortunately, we will have to wait for the next test case for guidance on how these sensitive matters are to be decided.

On 2 November 2009, almost exactly three years from initiation of the proceedings, the Claimants sought South Africa's consent to discontinue the proceedings.⁷¹ This was based on a private agreement reached between the Claimants and the Department of Minerals and Energy in terms of which the Claimants were granted mining rights without the 26 per cent historically disadvantaged South African equity divestiture contemplated in the MPRDA and the Mining Charter, in exchange for agreeing to a beneficiation offset coupled with a reduced 5 per cent equity divestiture. South Africa agreed to the discontinuance, but requested the Tribunal to issue a default costs award in its favour.⁷²

In the arguments on costs, both parties sought to demonstrate that they should be considered the prevailing party (and hence entitled to costs based on the rationale that costs follow the event) – the Claimants because their initiation of arbitration proceedings resulted in the mining licenses being renewed and the beneficiation offset agreement being entered into, and the Respondent because the Claimants did not actually benefit from any favourable treatment vis-à-vis other mining companies in the process of conversion of mining rights and as such could not have been said to have succeeded (as mentioned above, the MPRDA recognized various means through which to satisfy the historically disadvantaged equity requirements, including through a beneficiation offset).⁷³

The Tribunal was not to be drawn on these arguments, and declared that in this arbitration there is '*no real winner and no real loser*'.⁷⁴ Based on the circumstances of the particular matter (specifically the request for discontinuance and the Claimant's delay in doing so), the Tribunal decided that it would be fair and reasonable to require the Claimants to pay a portion of South

⁷¹ Award of the Tribunal, dated 4 August 2010, under case number ARB(AF)/07/1 para 79 (Tribunal award).

⁷² Tribunal award para 83.

⁷³ Tribunal award para 85 and 89.

⁷⁴ Tribunal award para 112.

Africa's costs defending the matter, to the amount of 400 000 Euro.⁷⁵ Despite the explicit statements by the Tribunal that in its view neither party had prevailed in this matter, the award of costs was hailed as a success and South Africa's DTI victoriously declared that the *Foresti* arbitration had been successfully concluded.⁷⁶ What the DTI failed to mention in its victory speech however was that the total costs that South Africa incurred in defending the international arbitration amounted to 5 675 467.12 Euro (of tax-payer money!).⁷⁷ South Africa thus managed to reclaim a paltry 7 per cent of its costs in this matter. This fact, coupled with the beneficiation offset agreement (and possibly the disturbing precedent that international arbitration can be used as a tactical tool by foreign investors unwilling to comply with transformation legislation to bully government), hardly indicates a successful result for South Africa, even on a very loose interpretation of the word!

CHAPTER 5: AFTER *FORESTI* – THE DTI BIT POLICY REVIEW FRAMEWORK

I. INTRODUCTION

The arbitral challenge launched by the *Foresti* Claimants culminated in a review of South Africa's approach to the regulation of foreign direct investment, in the form of BITs. Even though no award was made, the arbitration highlighted the manner in which foreign investors could use the provisions of BITs to block legitimate legislative and regulatory change in South Africa, or to claim compensation for these legitimate actions. For obvious reasons, and particularly considering the constitutional mandate for affirmative action as a means of rectifying apartheid injustices, this encroachment of legitimate policy space by foreign investors relying on historically negotiated BITs was considered unacceptable by South Africa and in urgent need of review. The BIT Investment Treaty Policy Framework review was initiated in 2005 and a dedicated Department of Trade and Industry Task Team assigned to this review (referred to as the DTI BIT policy review throughout this thesis). During the period of review, the DTI suspended negotiation and conclusion of any additional BITs, pending the outcome of the review (which was to consider both macro and micro policy considerations).⁷⁸

As mentioned in Chapter 2, it was hardly a surprise that South Africa had no history of negotiating BITs prior to 1994,⁷⁹ largely as a result of apartheid policies which lead to various embargoes and sanctions against South Africa. As democracy came to South Africa, so too did the

⁷⁵ Tribunal award para 133.

⁷⁶ See the media statement released by the DTI pursuant to the Tribunal award entitled 'Successful conclusion to the SA-*Foresti* arbitration matter' 5 August 2010, available at <https://www.thedti.gov.za/editmedia.jsp?id=1941> accessed on 1 July 2016.

⁷⁷ Tribunal award para 96.

⁷⁸ DTI BIT Policy Framework Review, Government Position Paper, published June 2009 (DTI BIT policy review) at page 12.

⁷⁹ DTI BIT policy review at page 5.

invitation to negotiate and BITs soon became a regular feature of democratic South Africa's foreign direct investment policy. According to the conclusions reached in the DTI BIT policy review, the new governments' zealotry to prove South Africa an investment-friendly destination meant that the risks of these policies were not fully appreciated, and the impacts on future policies not critically evaluated.⁸⁰

II. MACRO POLICY REVIEW OUTCOMES

The purpose of the macro-policy review was to determine South Africa's prevailing policy and strategy considerations being applied to the negotiation and initiation of BITs. Pursuant to the review, the DTI reached the following conclusions in respect of South Africa's macro-policy on BITs:

- It appeared that little or no legal or economic analysis of risks associated with the conclusion of BITs had been performed prior to conclusion of these instruments, which culminated in a lack of understanding of the consequences associated with BITs;⁸¹
- No holistic policy document informing the rationale for the conclusion of BITs was available; and South Africa's approach seemed instead to be based on a '*patchwork of general policy considerations*', which would likely differ between responsible line functions at different government departments;
- The link between BITs and foreign direct investment had not been examined, and no direct correlation could be said to exist without such analysis (Take for instance the *Foresti* case — even though factually the Claimants decision to invest in South Africa was not taken on the basis of a BIT, which at the time of investment did not exist, the Claimants were able to rely on the provisions of a BIT that was subsequently entered into to challenge South Africa's subsequent policy decisions. In such an instance, the provisions of a BIT were used, rather opportunistically one might argue, against South Africa even though such BIT did not form a basis for the decision to invest into South Africa) ;⁸²
- Countries are not individually assessed prior to entry into of a BIT to determine most appropriate forms of co-operation, rather a one-size-fits-all approach is taken and a generic range of agreements often proposed (or accepted) regardless of our trading partner or any unique circumstances of South Africa's relationship with that trading partner (for example, whether South Africa also exports capital to that party, or whether South Africa is solely a capital importer vis-a-vis that trading partner).

The DTI's BIT macro-policy review did not yield favorable results, but brought to light South Africa's somewhat schizophrenic policy approach to BITs to date, and an urgent need to rectify this.

⁸⁰ Ibid.

⁸¹ DTI BIT policy review at page 14.

⁸² DTI BIT policy review at page 22.

Where the macro-policy review focused on the circumstances surrounding South Africa's conclusion of BITs, the micro-policy review focused instead on the substantive impact of the contractual provisions set out in the BITs themselves.

III. MICRO-POLICY REVIEW OUTCOMES

a) *Review focus*

This review focused on a number of standard provisions generally found in BITs —some of which are highlighted in Table A above — together with the legal issues or trends that may emerge from the inclusion of such wording. The micro-policy review concluded with a number of policy recommendations which sought to address the legal issues that emerged from a substantive review of standard BIT provisions.⁸³

b) *Standard clauses*

Within this framework, the micro-policy review focused on the impact of 11 standard clauses found in the BITs that had been concluded by South Africa to date, and set out a policy response on each item that could be used to guide South Africa in their future investment protection negotiations.⁸⁴ Specifically, the review highlighted perceived problematic treaty language and made the following recommendations:⁸⁵

i. **Preamble**

the BIT preamble reflects and records the intentions and objectives of the State parties in concluding the BITs, providing necessary context to the BIT. Where there is ambiguity in interpretation of a BIT, the preamble may be used as an interpretive tool to determine the true intention underlying the BIT. As such, the customary absence of any reference to objectives broader than simply protection of investment could be problematic, and the DTI considered '*it advisable to introduce more specific language into preambles that emphasizes that investment promotion and protection should not undermine other key public values and should promote sustainable development.*'⁸⁶

ii. **Scope of investment clause**

BITs protect investments made by investors of the home state in a host state. This investment is often defined in '*open-ended terms and following an asset-based approach,*'⁸⁷ covering capital together with all assets of the investor. Generally, only those assets acquired for the purposes of

⁸³ DTI BIT policy review at page 26.

⁸⁴ DTI BIT policy review at page 27.

⁸⁵ This is a high-level summary of the findings of the DTIs substantive review of BIT provisions. For the detailed findings please see the DTI BIT policy review from page 26 onward.

⁸⁶ DTI BIT policy review at page 27.

⁸⁷ DTI BIT policy review at page 29.

investment are protected in terms of BITs, and the investment must be made accordance with domestic law of the host state.⁸⁸ Investments made by both juristic and natural persons are eligible for protection according to BITs, but a question has arisen as to the degree of control that a person should exercise over an investment for that investment to qualify for BIT protection. This was one of the jurisdictional elements in dispute in the *Foresti* case, where shareholders of certain operating companies (the *Foresti* Claimants) alleged that they had been expropriated, even though they did not in fact directly own the investments alleged to have been expropriated (mining rights held by South African established operating companies in which the foreign investors had only an indirect interest). The DTI also raised the international law presumption against retrospective treaty application, which presumption was expressly set aside in most BITs, which cover all existing investments and future investments. Referring back to *Foresti* this presumption becomes quite relevant, as the BITs under investigation in that arbitration were entered into pursuant to the Claimants having made their investments, but those investments were covered based on the retrospective application of the BITs.

iii. Standards of treatment of investments

BITs contain obligations regarding the standard of treatment, whether absolute or relative, that must be afforded to investors by host states. Examples of absolute standards of treatment⁸⁹ include the obligation to provide ‘fair and equitable treatment’, ‘full protection and security’, protection from expropriation and free transfer of funds. According to the DTI, these absolute standards lack precise meaning and greater clarity should be included in BITs regarding the content of these standards, which will help with a determination as to when absolute standards have been infringed by conduct of the host states.⁹⁰

Relative standards ‘define the required treatment to be granted to investment by reference to the treatment accorded to other investments’ (i.e. through a comparison of treatment of different investors) and includes the obligation to provide ‘national treatment’⁹¹ and ‘most-favoured nation treatment’ (MFN)⁹² to home state investors.

According to the DTI, the national treatment provisions set out in BITs often do not adequately cater for exclusions to such treatment (although there are a few exceptions to this generalisation), and there should be express language creating such exemptions (for example, the requirements for affirmative action measures applicable to certain categories of nationals, in order to

⁸⁸ DTI BIT policy review at page 29.

⁸⁹ So called because they are not contingent upon the treatment of any other investments (in other words, there is no comparison against the treatment of other investors or their investments).

⁹⁰ DTI BIT policy review at page 35.

⁹¹ Though this standard, foreigners should receive the same treatment as nationals in relation to their investments.

⁹² Investors of the home state must be treated as the investors from a most-favoured nation, thus levelling the playing-fields between foreign investors.

redress historic imbalances). Whilst most BITs do cater for exemptions to MFN treatment (for example, by excluding the benefits accorded to investors of third nations as a result of regional economic integration and double tax treaties, which are often matters subject to extensive negotiation), they do not go far enough to establish those matters on which MFN treatment could be requested (for example, does this treatment extend to substantive matters related to investment protection only, or also purely procedural matters such as dispute resolution). Future BITs should include explicit language governing the claim for MFN treatment and its ambit.

iv. **Expropriation**

The protection from expropriation is one of the main drivers for conclusion of BITs and all BITs contain at a minimum the right of investors to be protected from unlawful expropriation by the host state, and define narrow criteria that must be satisfied in order for an expropriation to be considered lawful, namely – it must occur on a non-discriminatory basis, for a public purpose and against payment of compensation. The terms expropriation and nationalization are often used interchangeably in BITs, but these terms are not properly defined, and there is further no clarity on those acts which do not themselves amount to expropriation but may have an effect that is ‘*equivalent to*’ expropriation, which are also prohibited in BIT language. Of particular relevance in the South African context, the BITs do not recognize a distinction between ‘deprivation’ and ‘expropriation’ as those terms are employed in section 25 of the Constitution of the Republic of South Africa (the Constitution), nor do the BITs recognize any distinction between regulation and expropriation, thus creating the possibility that ‘*legitimate government regulation will be deemed to constitute a form of indirect expropriation*’⁹³, as was the case in the *Foresti* arbitration.

Under BITs expropriation, to be lawful, must occur against compensation, and the measure of this compensation may be contentious. BITs generally require compensation to be ‘*prompt, adequate, and effective*’ or ‘*immediate, full and effective*’, or some combination of these terms, the consequence of which generally requires that the compensation for expropriation to be paid to investors reflects the market value of the expropriated investment. There is further no list of circumstances to be considered which may allow a host state to pay less than market-related compensation, depending on the reason that the expropriation was undertaken. This conflicts with the section 25 of the Constitution and the jurisprudence that has developed under that section, where less than market related compensation may be paid when considering the public interest purposes of the expropriation.⁹⁴ Under BITs, only the

⁹³ DTI BIT policy review at page 41.

⁹⁴ Section 25(3) provides that ‘*The amount of the compensation and the time and manner of payment must be just and equitable, reflecting an equitable balance between the public interest and the interests of those affected, having regard to all relevant circumstances, including (a) the current use of the property; (b) the history of the acquisition and use of the property; (c) the market value of the property; (d) the extent of direct state investment and subsidy in the acquisition and beneficial capital improvement of the property; and (e) the purpose of the expropriation.*’

economic value of the expropriated investment is considered, but not the circumstances surrounding the expropriation nor the public purpose being fulfilled, which creates tension with South African law.⁹⁵ Under the Constitution, the relevant consideration for determination of the amount of compensation is whether the compensation paid represents an amount that is just and equitable considering all relevant factors enumerated in section 25(3) (with market value being a single relevant factor in making this determination).⁹⁶

v. **Transfer of funds**

This provision ensures that investors are able to move their funds freely from host state to their home state, and obviously goes to the root of investment in the first place – the investor’s hope of reaping returns and then being able to repatriate these returns. There may be circumstances where this transfer may be restricted or subject to procedural requirements, such as South Africa’s exchange control regime, and BITs should reflect these legitimate qualifications to the free transfer of returns.

vi. **Dispute resolution**

Most BITs allow investors to ‘*directly initiate arbitration with host states*’ using the investor-state dispute mechanism enshrined in BITs.⁹⁷ There is generally no requirement for an investor to exhaust local legal remedies before it may initiate an international arbitration, which effectively allows an investor to leap-frog domestic legal systems at will. This provision was created to protect investors against perceived bias in domestic courts when initiating investment disputes against the government. However, there are many flaws in the international arbitral system including a lack of transparency in proceedings (which may be confidential and are not heard in open court), absence of an appellate process to challenge disputed rulings, appointment of arbitrators with no experience adjudicating complex public policy matters, no system of precedent or binding jurisprudence which may be relied on for legal certainty. Although not directly referenced in the DTI Policy review, the costs of international arbitration are also often prohibitive for developing countries – the *Foresti* case is illustrative of this, where South Africa spent a whopping 5,675,467.12⁹⁸ Euro on legal fees alone.⁹⁹ The result being that developing countries may be forced to abandon legitimate claims or defenses under BITs, where the costs of adjudicating them could be put to better use, for example through building critical infrastructure, supplying free medical treatment or education to the population.

⁹⁵ DTI BIT policy review at page 41.

⁹⁶ *Former Highlands Residents, in re: Ash v Department of Land Affairs* [2000] 2 All SA 26 (LCC). A detailed analysis of the jurisprudence that has developed under section 25 is beyond the scope of the current thesis and the author mentions this case law for the sake of completeness only.

⁹⁷ DTI BIT policy review at page 44.

⁹⁸ Using the average exchange rate of R11.66 for 2009, this amounts to R 66, 175, 946.62.

⁹⁹ To put these costs in perspective, this amounts to almost triple the amount spent on prevention of mother-to-child transmission of HIV/AIDS in Gauteng by South Africa’s Department of Health during 2008-9, according to figures published by South Africa’s National Aids Council.

vii. **Developmental issues**

According to the DTI, the BIT negotiating process (and the BITs that are concluded as a result) did not adequately address issues of sustainable development, which are vital from the perspective of a developing country.¹⁰⁰ Instead, existing BITs were ‘*based on a 50-year old model*’ that prioritizes the interests of investors from developed, capital-exporting home states over the developmental interests of host states.¹⁰¹ The DTI believed that relations between South Africa and developed home states were often skewed, and that any future BIT framework should aim to create more equitable relations between parties. Further, the sovereign right to regulate should be enshrined within BITs and investment protection should be balanced against other important policy objectives (such as the promotion of human rights). Whilst BITs set out a comprehensive set of rights that home state investors are entitled to receive within a host state, no corresponding obligations are placed on these investors, nor on their home state; with the result that BITs are ‘manifestly incomplete’¹⁰² and painfully biased.

c) *Recommendations*

The DTI recommended that, based on its findings, South Africa urgently review its stance on BITs (which encroached significantly into the policy space). This was also necessary as foreign investors had become aware of the possibilities of attacking legitimate government initiatives based on the historically concluded BITs (the *Foresti* arbitration and its unsatisfactory conclusion had received significant media attention, both locally and abroad, and left the door open for future claims against South Africa).

Pursuant to this review a decision was taken by the Cabinet of South Africa in 2010 that South Africa would:

- refrain from entering into further BITs absent any compelling economic or political reasons,
- terminate existing BITs
- develop an Act of Parliament to govern foreign direct investment into South Africa, and
- clarify the protection of investment and how it would apply in the context of South African law.

In furtherance of this decision, South Africa embarked on a process of terminating existing BITs and developing replacement national legislation. This legislation, the Protection of Investment Act, was subsequently developed and passed into law during the first half of 2016.

¹⁰⁰ DTI BIT policy review at see page 46.

¹⁰¹ DTI BIT policy review at page 46.

¹⁰² DTI BIT policy review at pages 50-2.

IV. Other BIT terminations

Although the decision to terminate BITs may be considered radical, it is worth pausing here to reflect on similar decisions taken by other countries.

In 2014, Indonesia announced its intention to terminate all 67 of its BITs and it appeared that Indonesia intended to ‘*create a new bilateral investment agreement that will be adjusted to recent developments*’.¹⁰³ Although no reasons were cited for Indonesia’s decision, speculation was that this was as a result of a number of unfavorable decisions against Indonesia in investment disputes.¹⁰⁴

In February 2016, Poland announced its intention to terminate its BITs with other European Member States. Amongst the reasons for this decision, Poland cited the ‘pressure’ being placed on it through international arbitration, as well as the fact that it had ‘*reached a level of democracy*’ which ensured that foreign investors and their investments would be protected, negating the need for BIT privileges.¹⁰⁵

During September 2009, Ecuador announced its termination of all existing BITs, based on the unconstitutionality of these treaties, which incorporated a waiver of sovereign jurisdiction (the unconstitutionality of BITs was later confirmed by the Constitutional Court, and the terminations ratified).¹⁰⁶

Although India has not yet terminated its historical BITs, it has undergone a process of redrafting its Model BIT to include, amongst other things, an obligation to exhaust local remedies prior to international arbitration. It remains to be seen whether India will renegotiate existing BITs based on the new model, and whether it will terminate those BITs where contracting parties refuse the new terms.

¹⁰³ Markus Burstaller and Michael Jacobsen ‘Indonesia terminates its bilateral investment treaty with the Netherlands from 1 July 2015 and may terminate all of its BITs’, available at <http://www.hoganlovells.com/en/blogs/international-arbitration-news/indonesia-terminates-its-bilateral-investment-treaty-bit-with-the-netherlands-from-1-july-2015-and-may-terminate-all-of-its-bits>, accessed on 1 July 2016.

¹⁰⁴ Ibid.

¹⁰⁵ Marta Waldoch ‘Poland plans to cancel bilateral investment treaties with the EU’, available at <http://www.bloomberg.com/news/articles/2016-02-25/poland-seeks-to-end-bilateral-investment-deals-with-eu-members>, accessed on 1 July 2016.

¹⁰⁶ Paula Hodges, Paul Kaplan and Peter Godwin ‘Further steps given by Ecuador to terminate its bilateral investment treaty with USA’, available at <http://www.lexology.com/library/detail.aspx?g=659d64fa-f050-456d-9cd7-85edfcfcbb38>, accessed on 1 July 2016.

CHAPTER 6: PROTECTION OF INVESTMENT ACT REVIEW

I. INTRODUCTION

The author now turns to examine the substantive provisions of the POI Act. The purpose of this review is to assess whether the POI Act could be considered successful in context. The POI Act could be considered successful if it meets its desired aims. For this purpose, it is necessary to examine whether the POI provides a satisfactory policy response to the BIT shortcomings exposed in the DTIs review and to which it was drafted in response.¹⁰⁷ Metaphorically, if BITs are the big bad wolf baring its teeth when developing countries attempt to exercise their sovereign rights, could protection of investment represent the fabled silver bullet?

In addition to considering whether the POI Act is able to satisfy the BIT shortcomings, it will also be useful to consider whether the POI Act is able to satisfy its own objects, as set out in the Memorandum of Objects of the POI Bill that accompanied its release. Specifically worth mentioning (and to which the author will return later) these objects include ‘*creating a predictable business environment that is readily understandable to an investor*’ and clarifying provisions typically found in BITs by codifying them.

II. TERMINATION PROCEDURE

Before progressing to a substantive review of the POI Act, it may be worth noting that the procedure through which South Africa terminated existing BITs (pursuant to the Cabinet decision to do so) was deemed less than satisfactory by some trading partners. South Africa simply allowed a number of treaties to lapse in accordance with their terms, but also summarily terminated those BITs that had not yet lapsed, often without any negotiation or discussion with trading partners. Whilst this was not a breach of the BITs (which allowed for termination on notice), it was considered a diplomatic *faux pas* and was criticized by (particularly European) trading partners as a move that would have a negative effect of investor confidence.¹⁰⁸

In contrast to the negative statements by European trading partners, there were also scholars and leading academics who lauded South Africa’s bold move as ‘pro-development’ and an example

¹⁰⁷ Even though the DTI BIT policy review did make specific suggestions in the context of BITs, it is the authors view that those suggestions remain valid considerations in the context of the POI Act, and the author does not believe that because the form of investment protection instrument is different (in other words, a legislative Act as opposed to a BIT), that the observations made in the context of BITs are necessarily invalidated.

¹⁰⁸ Sean Woolfrey ‘South Africa’s Promotion and Protection of Investment Bill – tralac’ Tralac.org, 2014 available at <http://www.tralac.org/discussions/article/5345-south-africa-s-promotion-and-protection-of-investmentbill.html>, accessed on 1 July 2016.

that could be followed by other developing nations.¹⁰⁹ The POI Act has now graduated from an abstract statement of policy to a fully-fledged legally binding act of parliament. It is this instrument that must now form the subject matter of our examination, and not any hypothetical statements that pre-dated its existence (as we are painfully aware as legal scholars, the devil is in the detail). The act must be examined on its substantive provisions and whether they are capable of meeting the desired aims, and without bias as to whether the procedure through which the act was arrived at, and BITS terminated, was optimal.

III. POI ACT SUBSTANTIVE REVIEW

The preamble to the POI Act provides insight into the context and background of the Act and sets out its statement of principle and purpose. The preamble is crafted in aspirational language and highlights, amongst other things, *‘the obligation to protect and promote rights enshrined in the Constitution’*, South Africa’s commitment *‘to maintaining an open and transparent environment for investments’*, the desire to promote investments *‘by creating an environment that facilitates processes that may affect investments’*, the responsibility of government *‘to provide a sound legislative framework for the protection of all investments, including foreign investments, pursuant to constitutional obligations’*, the necessity of a *‘balance of rights and obligations’* of investors, whilst recognizing *‘the obligation to take measures to protect or advance’* historically disadvantaged South Africans and South Africa’s right to regulate in the public interest.

Even though the preamble of legislation is not binding, it does set the scene for the provisions that follow. The preamble of the POI Act succeeds in crafting a careful statement regarding the balance between investment protection and broader public policy objectives, and satisfies the DTI BIT policy review finding that specific language should be included in the preamble to emphasize policy objectives broader than simply investment protection.

Section 2 of the POI Act sets out the scope of investments included within the Act. Whilst section 2(2) does set out a non-exhaustive list of investments which largely correlates with the definition of investment protected under BITs (including shares in companies, movable and immovable property and intellectual property), section 2(1) sets out a rather curious qualifier – any enterprise must be established/acquired or expanded lawfully by an investor by *‘committing resources of an economic value over a reasonable period of time in anticipation of profit.’* It is unclear why it was deemed necessary to include a timeframe for holding of an investment, nor is any guidance given as to what may constitute a reasonable period of time in the context of an investment. This may create uncertainty regarding the scope of protected investments, in contrast with the specific object of the

¹⁰⁹ Joseph Stiglitz ‘South Africa Breaks Out’, Project Syndicate 2013, available at: <https://www.projectsyndicate.org/commentary/joseph-e--stiglitz-on-the-dangers-of-bilateral-investment-agreement>, accessed on 1 July 2016.

POI Act to create a predictable and readily understandable business environment. However, by creating a threshold for qualifying investments, the POI Act does ensure that only ‘serious’ investments are entitled to the protections set out in the POI Act.

Section 3 governs interpretation of the POI Act, and provides that it is to be interpreted consistently with its stated purpose, the Constitution of South Africa, including the Bill of Rights, customary international law and international law; and any relevant convention or international agreement to which South Africa is a party. Although no jurisprudence exists on this point, an argument could be made that later BITs concluded by South Africa (South Africa has not shut the door on BITs completely and is in the process of drafting a Model BIT for use in BIT negotiations), or alternatively duly terminated BITs surviving through a sunset provision, could amount to a relevant international agreement to which an adjudicator could have reference when interpreting the POI Act. This potentially leaves the door open for recourse to BITs in interpreting the POI Act, where there may be uncertainty regarding the legislative position.

The POI Act applies to all investments satisfying its investment criteria made in South Africa and there is no distinction between national or international investors (section 5). It is unclear why nationals have been brought into scope, since the review that culminated in the POI Act arose from the specific circumstances of a claim by a foreign investor under a BIT.¹¹⁰ On the other hand however, an argument could be made that it contributes to legal certainty by having a single regime applicable to all investments (whether domestic or foreign). As such, the author does not consider that it is a *prima facie* failing of the POI Act that nationals are included within its ambit. However, through the effective exclusion of home states in contrast with the BIT regime where home states are a party to the agreement and therefore bound by it, the POI Act does lose the benefit of possible recourse to home state intervention (the inclusion of home state obligations was also mooted in the DTI BIT policy framework review).

Section 6 accords all investors the right to fair administrative treatment, and places an obligation on South Africa to ensure that administrative, legislative and judicial process do not operate arbitrarily or deny investors administrative or procedural justice. This standard of fair administrative treatment appears, at least on a plain reading, to differ from the standard of ‘fair and equitable treatment’ contained in BITs. There appears to be a deliberate attempt to employ a standard of treatment different to the BIT standard of fair and equitable treatment here, which cannot simply be overlooked. See Table A which sets out the standards of treatment employed in South African BITs. Save for the BIT concluded with Iran, every English language BIT to which South Africa is a party employs the standard of ‘fair and equitable treatment’ and the choice to use different language in the

¹¹⁰ The inclusion of nationals is mentioned for the sake of completeness, and this thesis does not aim to assess in detail the impact of the inclusion of nationals in the POI Act, nor to examine the previous investment protection standards that nationals could have relied on.

POI Act reflects an intention to reference a different standard of protection (and does not simply codify the BIT standard). The remainder of section 6 then provides certain colour to this right and includes an investor's right to receive written reasons for administrative decisions, access to government held information in a timely fashion, and to have disputes heard in a fair public hearing (all of which can be achieved through reliance on generally applicable legislation, such as the Promotion of Administrative Justice Act and the Promotion of Access to Information Act). It appears that this provision reflects the dictates of procedural fairness, but may fall short of the standard of fair and equitable treatment enshrined in BITs. On the other hand, this particular wording may simply represent an attempt to interpret the 'fair and equitable' standard of treatment traditionally found in BITs. Whether the POI Act actually represents a different level of fair and equitable treatment as the BITs will only be determined through the creation of jurisprudence on this point. The POI Act does not succeed in codifying or clarifying the BIT standard of fair and equitable treatment, and instead includes distinct wording that creates further uncertainties.

Section 8 sets out a national treatment obligation for foreign investors. However, unlike the equivalent BIT provision, this standard of treatment is not open-ended, but applies only to foreign investors in 'like circumstances' as South African investors. A non-exhaustive list of like circumstances is then enumerated, together with a set of exclusions as to when national treatment will not apply. Included in this set of exclusions from national treatment are affirmative action measures in favour of historically disadvantaged South Africans. The POI Act contains both a limitation on the scope of the national treatment standards (the requirement for like circumstances), together with explicit exemptions to cater for South Africa's unique circumstances. This clause appears to have been drafted to cater for the specific claims arising from the *Foresti* arbitration, and explored in the DTI BIT policy review.

Section 12 enshrines the right to regulate in the public interest, which was absent from most of the BITs concluded by South Africa, and certainly from the two BITs under investigation in the *Foresti* arbitration. This section enshrines the right to take measures, in accordance with the Constitution and applicable legislation, to (amongst other things) redress historical, social and economic inequalities, promote and preserve cultural heritage and practices, achieve progressive realization of socio-economic rights and protect the environment. The inclusion of section 12 in the POI Act responds to one of the main elements of dispute in the *Foresti* case, and upholds the sovereign right to regulate in the public interest, even where this may have a negative impact on investments and notwithstanding any of the protections contained in the POI Act.

Section 13 sets out the dispute resolution mechanisms authorized in the POI Act. First, investors may have recourse to mediation upon request within 6 months of becoming aware of a dispute relating to any action taken by government (section 13(1)). The mediation is to be facilitated by the

DTI, which is to maintain a list ‘*of qualified mediators of high moral character and recognized competence in the fields of law, commerce, industry or finance.*’ Section 13(2) provides that an investor, upon becoming aware of a dispute as referred to in 13(1) may approach any competent South African court, independent tribunal or statutory body for dispute resolution. Investors may only have recourse to international arbitration after the exhaustion of domestic remedies and with government consent. Should these requirements be satisfied, then the arbitration is to be conducted between South Africa and the home state of the applicable investor.

Upon a plain reading of section 13, clarity is required on a number of aspects, including:

- What is the status of the mediation set out in section 13(1), and will agreements reached be considered binding?;
- Why has a 6 month time period been placed on a request for mediation? Surely it is always preferable that disputes be settled out of court where possible and as such limiting the time in which mediation may be requested frustrates this, and effectively forces disputing parties into court once the 6 month period has lapsed;
- Why is human rights expertise not specifically mentioned as a relevant consideration in the appointment of mediators, which may mitigate against an unbalanced consideration of only narrow commercial interests (which was one of the limitations highlighted in the appointment of international arbitrators under the BIT regime)?
- Why are the section 13 causes of action limited to ‘action taken by the government, which action affected an investment’ – does ‘action’ include government omissions?
- Does the 6 month time limit apply to the initiation of proceedings in court? This would amount to an unacceptable and unlawful inroads on principles of prescription;
- Are there any standards of conduct applicable to government when refusing a request for international arbitration? Should government act reasonably or is there a measure of deference to be applied here? For example, should government be forced into an expensive international arbitration where an investor requests, even where government has presumably succeeded in domestic courts (failing which it is difficult to understand the rationale for the investor’s request for arbitration). Alternatively, if the fear is that domestic courts will be biased towards government (which was the *raison d’etre* for international arbitration under BITs), should foreign investors be bound to accept government’s decision to avoid international arbitration? The possibility of international arbitration by consent only after exhaustion of local remedies adds an element of inherent bias – why would a successful party to litigation agree to an uncertain (and costly) result under arbitration after already succeeding at a local level? This ability to block international arbitration will undoubtedly cause concern for foreign investors.

- Should international arbitration be agreed, will the international arbitrators be bound to adjudicate in terms of the POI Act? Alternatively, what will the cause of action be in the absence of a BIT?
- What is the legal basis for arbitration to be conducted between South Africa and the investor's home state? In the absence of a BIT to which a home state has contracted, it is unclear what the jurisdiction of the home state will be in this instance.

On a plain reading of section 13, there are a number of questions that arise as to interpretation (a few of which the author has set out above) and also legal basis for the creation of jurisdiction for the home state. Even if these considerations were not in issue, the sheer amount of uncertainty created through lax drafting of this clause introduces the possibility of litigation, and also fails to satisfy the aim of creating legal certainty.

Section 15 sets out the transitional provisions, and includes an important 'savings' provision (which was omitted from previous versions of the POI Bill). In terms of this section, all existing investments that were made under BITs continue to be protected in terms of the sunset clauses contained in those BITs. Any investments made after termination of BITs but before the POI Act will be governed by South Africa law. The import of section 15 appears to be that three distinct regimes are created in respect of foreign investment protection:

1. Investments made before the cancellation or expiry of a relevant BIT will continue to be protected for the duration of the sunset clause, in terms of that BIT;
2. investments made after cancellation or expiry of the BIT but before the promulgation of the POI Act, will be protected in terms of general South African law; and
3. Investments made after the promulgation of the POI Act will be subject to the provisions contained in that Act.

CHAPTER 7: DISCUSSION

I. INTRODUCTION

The author now turns to investigate the central question of this dissertation – whether the POI Act represents a viable alternative to BITs in South Africa, through satisfying each perceived limitation in BITs. In this chapter, the focus will be on the impact of some of the legislative provisions referenced above.

II. NATURE OF LEGAL INSTRUMENT

Before any analysis of whether the terms of the POI Act could satisfy the limitations in BITs highlighted in the DTI BIT Policy Framework review, it is worth making a few preliminary

observations in respect of the instrument selected to rectify the perceived limitations in the BITs, being local South African legislation, the POI Act. First and foremost, it is worth noting that none of the recommendations made through the DTI BIT Policy Review indicated that local legislation (to the exclusion of BITs) might be the most appropriate instrument through which to address the shortcomings highlighted through the review. Instead the review concluded with a number of policy options for South Africa, amongst others, a review of commitments under existing BITs, allowing existing BITs to lapse and then reassessing South Africa's position in respect of the form and content of BITs, developing a Model BIT to address the perceived substantive issues and possibly domestic legislative intervention. It therefore appears that the DTI did not contemplate that domestic legislation alone could solve the issues that arose through the BIT review. Although DTI policy statements made do indicate that a Model BIT is in the process of being drafted, the POI Act does not directly reference nor incorporate any such Model BIT. As at the date of this thesis, the POI Act is the only instrument governing foreign investment directly (of course, there may be generally applicable laws, as well as BITs in existence through the application of sunset clauses), and the POI Act must be reviewed in this light. Of course, this is not per se a failing, and would not be if the POI Act could factually meet the requirements set out in the DTI BIT policy review. The rest of this chapter will be dedicated to determining whether this is, or could reasonably be, the case.

One significant drawback of the approach of protecting foreign direct investment through local legislation alone is the removal of a contractual nexus with a home State, which has a number of implications. One such implication is the lack of reciprocity by a BIT contracting party – by cancelling all BITs and refusing to re-negotiate them, South African investors investing in that contracting jurisdiction and who previously enjoyed reciprocal investment protection under a BIT, will lose this protection for their investments in that contracting party, and may be subject to different levels of investment protection (if at all). This means that many South African investors who are capital exporting are placed in an analogous position as was the case pre BITs, and are faced with the realities of investing into a jurisdiction without legal certainty as to their rights and the standards of treatment they will enjoy in that host state. This appears to conflict with the DTI BIT Policy Review, which explicitly recognized in its conclusion and recommendations that BITs might be unavoidable, given the demands of South Africa's '*own business community who seek protection for their outward-bound investments*'.¹¹¹ The cancellation of BITs has effectively eradicated these protections, and the POI Act cannot re-instate such protection. South African capital exporting investors (in the absence of any other preferential treatment through regional or other arrangements) are worse off as a result of the cancellation of BITs and replacement with national legislation.

¹¹¹ DTI BIT policy review at page 56.

Another point worth noting is that the choice of investment protection instrument might actually erode investor confidence, thereby having an undesired and unintended negative consequence. This is because, unlike the BITs which would be subject to negotiation and mutual agreement to amend, the POI Act is a unilateral legislative instrument, which can be revoked or amended at the instance of South Africa alone, thereby significantly damaging investor confidence in the regime itself (and almost negating any substantive consideration of its merits, which may be altered at will). Further, the move away from negotiation and towards unilateral regulation may be perceived negatively by the international community, and may contribute to the growing unease with the South African business environment that some trading partners have voiced.

III. NOTABLE OMISSIONS

Before embarking on a discussion on the substantive provisions of the POI Act, it will be worthwhile to highlight some notable omissions.

The preamble of the POI Act asserts that one of its aims is to secure ‘*a balance of rights and obligations of investors*’. However, upon review of the Act, substantive obligations for foreign investors are conspicuously absent. In fact, other than section 7s requirement that investments be established in compliance with South African law, there are no substantive obligations placed on investors. No performance requirements are placed on investors, nor are any standards of conduct required from investors (these are two matters specifically referenced in the DTI Policy review). According to the DTI, ‘*an investment agreement that does not address investor obligations is manifestly incomplete*’¹¹², and the absence of any investor obligations from the POI Act could represent a missed opportunity. The POI Act, much like the BIT regime that came before it, only places obligations on the host state (South Africa), and entitles investors to certain standards of treatment from South Africa – fair administrative treatment (section 6) and national treatment for foreign investors in like circumstances with South African investors (section 8). Whilst granted there are limitations placed on these standards of treatment (as set out above), which differs from the situation under many BITs, these limitations cannot substitute for positive obligations on the part of investors. The standards of conduct required under the POI Act unfortunately remain one-sided in favour of investors, just as their BIT predecessor did.

The POI Act does not specifically reference nor incorporate the BIT protections against unlawful expropriation nor the payment of ‘prompt adequate and effective compensation’, but instead accords all investors the right to property as enshrined in the Constitution. The BIT protection against unlawful expropriation and compensation requirements were an essential element in dispute in the *Foresti* case and subsequent DTI review. The DTI review highlighted the clear tension between the

¹¹² DTI BIT policy review at page 51.

supreme law of South Africa, being the Constitution, and the BITs – both in respect of the scope of government acts that may amount to expropriation (with the Constitution recognising a distinction between deprivation and expropriation, whilst the BITs did not) and the requirements of compensation (which may be less than market-value under the Constitution, but not BITs requiring ‘full’ or ‘effective’ compensation to be paid). Through expressly incorporating section 25 of the Constitution, the POI eliminates the potential for future disputes in respect of differences in interpretation in respect of expropriation provisions of the Constitution and BITs, and ensures that the Constitutional standards will apply to all investors.

Another notable omission from the POI Act is the absence of most-favoured nation treatment, which was a regular feature of BITs. As mentioned above, this is a relative standard of treatment which ensures that each investor, regardless of their home state, was treated as ‘most favoured’ in relation to protection of investment in the host state. The POI Act incorporates only national treatment standards, but not their usual accompaniment, most-favoured nation treatment. The impact of this could be that, should later BITs be concluded based on South Africa’s Model BIT, then those investors will potentially be treated more favourably than investors (either South African or foreign) governed only by the POI Act. Whilst this is understandable from a South African policy perspective (where BITs are an exception, and may be entered into based on special relationships between contracting parties and accepted reciprocal favourable treatment), it is likely to cause unhappiness for foreign investors, who will have to accept that their investment could receive less favourable treatment in relation to the investments of other foreign investors, and they would be unable to claim that same favourable treatment through invoking a most-favoured nation clause.

IV. DRAFTING SUCCESSES

Based on the specific provisions of the POI Act referenced in the preceding Chapter, the POI Act is successful in satisfying some of the concerns raised in respect of BITs in the DTI BIT review. In particular, the POI Act has succeeded in:

- Including reference to aims broader than simply investment protection in its preamble, thereby providing crucial context, which was often lacking in BITs;
- Enshrining South Africa’s sovereign right to regulate at section 12, which right was often curtailed in BITs;
- Including an obligation to exhaust local remedies before recourse may be had to international arbitration. Various authors have expressed concerns that international arbitration may not be the most appropriate forum to adjudicate foreign investment disputes, for a host of reasons including: lack of transparency, no system of precedent, limited (if any) consideration of

objectives broader than investment protection and prohibitive costs for developing countries. These factors were also raised in the DTI BIT review;

- Limiting the application of national treatment to the situation where local and foreign investors are in ‘like circumstances’ and further legislating exceptions to national treatment standards;
- Incorporating the constitutional protection against expropriation and related jurisprudence through section 10, ensuring that a single standard applies to local and foreign investors;

The POI Act has (at least on paper) succeeded in rectifying a number of perceived BIT limitations. Unfortunately, for all of the gains made through the POI Act, the author considers that the POI Act is fatally flawed in a significant respect.

V. POI FLAWS

The POI Act was drafted in response to the limitations in the BIT framework, which were first (and very publicly) exposed through the *Foresti* arbitration, and eventually formed the basis of the DTI BIT review. The *Foresti* arbitration exposed the manner in which South Africa’s BITs could be used by disgruntled investors to challenge legitimate government policy, a topic which South Africa considered serious enough to mandate a task team to investigate it. This task team then spent almost four years¹¹³ investigating South Africa’s BIT macro and micro policies, and developed a detailed position paper in response to the limitations highlighted in the review and recommending policy responses to these limitations. The review findings highlighted numerous flaws in South Africa’s historically negotiated BITs (from South Africa’s perspective), which opened the door for further litigation against South Africa, and particularly against its affirmative action policies. The POI Act was drafted as a replacement to these BITs.

The BIT savings provisions contained in transitional provisions of the POI Act, which allow an investor to have recourse to BITs where an agreed sunset period has not expired, repudiate the very existence of the POI Act. As you will see from Table A above, some of these sunset clauses extend to 20 years! This means that investors from ex-contracting parties may continue to challenge South African government policy (including affirmative action policies) for 20 years from South Africa’s termination of the BIT in question. The POI Act effectively crystallized an unsatisfactory position under the BITs. Further, there is an argument to be made that, based on the most-favoured nation provisions contained in the BITs (and surviving through the applicable sunset clauses), investors will be entitled to rely on the longest sunset period. Once again, referring to Table A, this theoretically could mean that the 10 year sunset provision in the Danish, Greek, Chinese, Iranian and Nigerian

¹¹³ DTI BIT policy review at page 12, states that the review commenced in 2005. The report was published in June 2009.

BITs could be extended to 20 years through reliance on the most-favoured nation provision, and considering the more favourable 20 year sunset provision in the United Kingdom or German BIT (for example). This is obviously an untenable situation.

Aside from this fatal flaw, the POI Act fails in the following material respects:

- The POI Act does not create legal certainty. Instead, it enshrines recourse to 3 different governing laws, depending on when an investment was made – all investments made under BITs continue to be protected under the terms of that BIT for the duration of the sunset clause, all investments made after the termination of BITs but before promulgation of the POI are governed by general South African law, and all investments made after the promulgation of the POI Act will be governed by that Act;
- The POI Act does not place any substantive obligations on investors, contrary to the statements made in the DTI BIT review;
- The loss of reciprocity, through the unilateral termination of BITs and replacement with national legislation, will likely be problematic for investment protection of South African citizens investing abroad.
- The POI Act does not set out an overarching investment policy for South Africa and there is arguably still a ‘patchwork of considerations’ that apply, this time based on the date at which the investment was made (which determines the law that will apply).

VI. CONCLUSION

The aim of this thesis was to examine whether South Africa’s POI Act represented a viable alternative to BITs for the protection of foreign investment. To do this, the author examined the criticisms leveled at BITs, and undertook to investigate whether the POI Act addressed and rectified these criticisms in a satisfactory manner, through a review of the provisions of the POI Act.

In the introductory chapter the scene was set for the problem under investigation. Chapter 2 briefly explored the history of BITs worldwide, and in particular the reasons for their conclusion and development. Here the author also touched on South Africa’s history of negotiating BITs. Chapter 3 then delved into more depth on South Africa’s BITs and their typical provisions, culminating in a review of a number of standard (problematic) clauses across South Africa’s BITs. Chapter 3 focused on the standard provisions across South Africa’s BITs, and Chapter 4 then underscored the impact of these provisions, which came to the fore in the *Foresti* arbitration. Chapter 4 detailed the arbitral claims of the *Foresti* Claimants, which centered on South Africa’s alleged breach of two BITs, as well as South Africa’s response to these claims. The purpose of Chapter 4 was to highlight through a practical example, how BITs may encroach on legitimate policy space in the sphere of human rights. In the *Foresti* example, the provisions of two historically negotiated BITs were used to challenge

South Africa's affirmative action policies, which were drafted in response to the inequalities created by the deplorable apartheid construct. Chapter 5 focused on the fallout from *Foresti*, and South Africa's policy responses to the realization that historical BITs could be used to block legitimate affirmative action measures in the public interest. These policy responses were contained in the DTI BIT Policy Review Framework, and Chapter 5 summarised the DTI's recommendations in respect of South Africa's macro and micro BIT policy. Chapter 5 provides the necessary context for the development of the POI Act in South Africa, and sets the benchmark for comparison against the POI Act, through highlighting the perceived BIT limitations. The purpose of Chapter 6 is to review the substantive provisions of the POI Act, together with an analysis of whether the POI Act satisfies the limitations highlighted in the DTI BIT policy framework. Chapter 7 discusses the apparent successes and failures of the POI Act, in satisfying its own aims as well as the DT BIT review findings.

Based on the DTIs findings in its review compared against the substantive provisions contained in the POI Act, and particularly the fatal flaw which effectively crystallises the BIT framework with all its apparent imperfections, the author does not believe that the POI Act represents a viable alternative to BITs. Although the POI Act does succeed on some aspects highlighted in the DTI BIT review – including a limitation of recourse to international arbitration and national treatment for foreigners – the successes of the POI Act are unfortunately outnumbered by its flaws. Unfortunately, through South Africa's refusal to enter into BIT negotiations prior to termination, they have thrown the metaphorical baby out with the bathwater. South Africa has somehow, through the POI Act, succeeded in possibly alienating its trading partners and definitely offending them, without actually improving its position under the BITs, which continue in existence. Had South Africa entered into BIT negotiations, there may have been the possibility that a better deal was agreed, as opposed to being bound by a bad deal for the duration of a sunset provision. Just as the newly democratic South Africa was too zealous to enter into BITs, so too were they over-zealous in exiting them. In both instances, to the detriment of South Africa which continues to be bound by historical badly drafted BITs. A better alternative would have been renegotiating historical BITs based on a Model BIT, which addressed the limitations highlighted in the DTI BIT review and which was based on a coherent BIT policy. This would have also succeeded in preserving BIT protections for South African nationals investing abroad. With the amount of controversy it has created, South Africa could have actually gone further to correct a biased framework, but instead, it has crystallised the unfavorable position for at least the duration of the sunset clauses and created fragmented legal regimes (thus opening itself up to constitutional scrutiny for schizophrenic treatment of investors across different regimes). The POI Act represents a missed opportunity for South Africa to develop a holistic investment protection policy based on reciprocity, and therefore fails as a viable investment protection alternative to BITs.

Table A

Provisions relating to	United Kingdom	Germany	Netherlands	Sweden	Czech Republic
Signature date	20-Sep-94	11-Sep-95	09-May-95	25-May-98	14-Dec-98
Application to investments made before entry into of BIT	Investment includes all investments, whether made before or after entry into of BIT.	Applies to investments made prior to entry into force of the treaty, as well as during the course of the BIT.	Applies to investments made from and before the date of the treaty.	Applies to all investments, whether made before or after entry into force of the BIT. Each Contracting Party shall apply to investments made in its territory by investors of the other Contracting Party treatment which is no less favourable than that accorded to investments made by its own investors or by investors of third States, whichever is the more favourable	BIT applies to future investments made by investors, of one Party in the territory of the other Party, and also to the investments existing at the date the BIT is entered into.
Fair and equitable treatment	Investments of nationals or companies of each contracting party shall at all times be accorded fair and equitable treatment and shall enjoy full protection and security in the territory of the other contracting party. Neither contracting party shall in any way impair by unreasonable or discriminatory measures the management, maintenance, use, enjoyment or disposal of investments in its territory of nationals or companies of the other contracting party.	Investments must be accorded fair and equitable treatment. Neither contracting party shall in any way impair by arbitrary or discriminatory measures the management, maintenance, use or enjoyment of investments in its territory of nationals or companies of the other contracting party.	Each Contracting Party shall ensure fair and equitable treatment of the investments of investors of the other Contracting Party and shall not impair by unreasonable or discriminatory measures, the operation, management, maintenance, use, enjoyment or disposal thereof by those investors. Each Contracting Party shall accord to such investments full physical security and protection.	Each Contracting Party shall at all times ensure fair and equitable treatment of the investments by investors of the other Contracting Party and shall not impair the management, maintenance, use, enjoyment or disposal thereof as well as the acquisition of goods and services and the sale of their production, through unreasonable or discriminatory measures.	Investments of investors of either Party shall at all times be accorded fair and equitable treatment and shall enjoy full protection and security in the territory of the other Party. Each Party shall in its territory accord to investors of the other Party, as regards management maintenance, use, enjoyment or disposal of their investment, treatment which is fair and equitable and not less favourable than that which it accords to its own investors or to investors of any third State.

<p>Most-favoured nation and national treatment provisions</p>	<p>Neither contracting party shall in its territory subject investments or returns of nationals or companies of the other Contracting Party to treatment less favourable than that which it accords to investments or returns of its own nationals or companies or to investments or returns of nationals or companies of any third state.</p> <p>Neither contracting party shall in its territory subject nationals or companies of the other contracting party, as regards their management, maintenance, use, enjoyment or disposal of their investments, to treatment less favourable than that which it accords to its own nationals or companies or to nationals or companies of any third state.</p>	<p>Neither contracting party shall subject investments (or nationals or companies as regards their investment activities) in its territory owned by nationals or companies of the other contracting party to treatment less favourable than it accords to investments of its own nationals or companies or to investments of nationals or companies of any third state.</p>	<p>Each Contracting Party shall accord to investments treatment which in any case shall not be less favourable than that which it accords to investments of its own investors or to investments of investors of any third State, whichever is more favourable to the investor concerned.</p>	<p>Each Contracting Party shall apply to investments made in its territory by investors of the other Contracting Party treatment which is no less favourable than that accorded to investments made by its own investors or by investors of third States, whichever is the more favourable.</p>	<p>Each Party shall in its territory accord to investments and returns of investors of the other Party treatment which is fair and equitable and not less favourable than that which it accords to investments and returns of its own investors or to investments and returns of investors of any third State.</p>
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<p>Protection from expropriation and compensation for expropriation</p>	<p>Investments of nationals or companies of either contracting party shall not be nationalised, expropriated or subjected to measures having effect equivalent to nationalisation or expropriation, in the territory of the other contracting party except for a public purpose related to the internal needs of that party on a non-discriminatory basis and against prompt adequate and effective compensation.</p>	<p>Investments shall not be expropriated, nationalised or subjected to any other measure the effects of which would be tantamount to expropriation or nationalisation in the territory of the other contracting party except for in the public interest and against compensation.</p> <p>Compensation must be equivalent to the value of the expropriated investment immediately before the date on which the actual or threatened expropriation, nationalisation or comparable measure has become publicly known.</p> <p>Compensation shall be paid without delay and shall carry the normal commercial interest until the time of payment, and shall be effectively realisable and freely transferable. Legality of expropriation and compensation subject to review by due process of law.</p>	<p>Neither Contracting Party shall take any measures depriving, directly or indirectly, investors of the other Contracting Party of their investments unless the following conditions are complied with:</p> <p>(a) the measures are taken in the public interest and under due process of law; (b) the measures are not discriminatory or contrary to any undertaking which the Contracting Party which takes such measures may have given; (c) the measures are taken against just compensation.</p> <p>Such compensation shall represent the genuine value of the investments affected, shall include interest at a normal commercial rate until the date of payment and shall, in order to be effective for the claimants, be paid and made transferable, without delay, to the country designated by the claimants concerned and in the currency of the country of which the claimants are nationals or in any freely convertible currency accepted by the claimants.</p>	<p>Neither Contracting Party shall take any measures depriving, directly or indirectly, an investor of the other Contracting Party of an investment unless the following conditions are complied with:</p> <p>(a) the measures are taken in the public interest and under due process of law; (b) the measures are distinct and not discriminatory; and (c) the measures are accompanied by provisions for the payment of prompt, adequate and effective compensation, which shall be transferable without delay in a freely convertible currency.</p>	<p>Investments of investors of either Party shall not be nationalised, expropriated or subjected to measures having effect equivalent to nationalisation or expropriation, in the territory of the other Party except for a public purpose.</p> <p>The expropriation shall be carried out under due process of law, on a non-discriminatory basis and shall be accompanied by provisions for the payment of prompt, adequate and effective compensation.</p> <p>Such compensation shall at least be equal to the value of the investment expropriated immediately before the expropriation or impending expropriation became public knowledge, shall include interest at a normal commercial rate from the date of expropriation, shall be made without undue delay, be effectively realisable and be freely transferable in freely convertible currency.</p>
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Exceptions	Most favoured nation and national treatment provisions do not apply in relation to existing or future customs union or similar international agreement; or an arrangement relating to taxation.	Most favoured nation and national treatment provisions do not apply to advantages as a result of customs or economic union, a common market or a free trade area; or advantages under a double tax treaty.	Most favoured nation and national treatment provisions do not apply to advantages as a result of customs unions, economic unions, monetary unions, free trade areas, common markets or similar institutions, or on the basis of interim agreements leading to these; double taxation arrangements.	Most favoured nation and national treatment provisions do not apply to advantages as a result of a customs union, a common market or a free trade area.	Most favoured nation and national treatment provisions do not apply to advantages as a result of a customs union, a common market or a free trade area, taxation arrangements. A further exception relates to any law or other measure the purpose of which is to promote the achievement of equality in its territory, or designed to protect or advance persons, or categories of persons, previously disadvantaged by unfair discrimination.
Investor/state dispute settlement	Disputes to be submitted to international arbitration - either to the International Centre for the Settlement of Investment Disputes (ICSID); the Court of Arbitration of the International Chamber of Commerce; or an international arbitrator or ad hoc arbitration tribunal to be appointed by special agreement or established under the arbitration rules of the United Nations Commission on International Trade Law.	Disputes to be submitted to international arbitration. To be submitted for arbitration under the Convention on the Settlement of Investment Disputes between States and Nationals of other states or under the Additional Facility for the administration of proceedings by the secretariat of the International Centre for Settlement of Investment Disputes.	Disputes submitted to be international arbitration, either ICSID, the Court of Arbitration of the International Chamber of Commerce, or an international arbitrator or ad hoc arbitration tribunal to be appointed by a special agreement or established under the Arbitration Rules of the United Nations Commission on International Trade Law.	Disputes submitted to ICSID or either to the Additional Facility of ICSID or to an ad hoc arbitral tribunal to be set up under the Arbitration Rules of the United Nations Commission on International Trade law (UNCITRAL).	Disputes may be submitted to competent courts or administrative tribunals of the parties, ICSID or the Additional Facility for the Administration of Proceedings by the Secretariat of ICSID or an arbitrator or international ad hoc arbitral tribunal established under the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL).
Sunset clause	In respect of investments made whilst the agreement is in force, its provisions shall continue in effect with respect to such investment for a period of 20 years after the termination	In respect of investments made prior to termination, continues in effect for 20 years.	In respect of investments made prior to termination, continues in effect for 15 years.	In respect of investments made prior to termination, remains in force for a period of 20 years from termination date.	In respect of investments made prior to termination, continues in effect for 15 years.

Provisions relating to	Denmark	Finland	Greece	Korea	China
Signature date	22-Feb-96	Dated 1998	19-Nov-98	07-Jul-95	30-Dec-97
Application to investments made before entry into of BIT	Applies to investments made by investors of one Contracting Party in the territory of the other Contracting Party prior to or after the entry into force of the Agreement.	Applies to all investments, whether made before or after entry into force of the BIT.	BIT also applies to existing investments made prior to its entry into force by investors.	Applies to all investments whether made before or after entry into force of the BIT.	BIT applies to investments which are made prior to or after its entry into force.
Fair and equitable treatment	<p>Each Contracting Party shall in its territory accord to investments made by investors of the other Contracting Party fair and equitable treatment which in no case shall be less favourable than that accorded to its own investors or to investors of any third state, whichever is the more favourable from the point of view of the investor.</p> <p>Each Contracting Party shall in its territory accord investors of the other Contracting Party, as regards their management, maintenance, use, enjoyment or disposal of their investment, fair and equitable treatment which in no case shall be less favourable than that accorded to its own investors or to investors of any third State, whichever of these standards is the more favourable from the point of view of the investor.</p>	<p>Investments by investors of one Contracting Party shall at all times be accorded fair and equitable treatment and shall enjoy full protection and security in the territory of the host Party.</p> <p>The host Party shall in no way in its territory, by unreasonable or discriminatory measures, impair the management, maintenance, use, enjoyment or disposal of investments by investors of the other Contracting Party.</p>	<p>Investments by investors of a Contracting Party shall, at all times be accorded fair and equitable treatment and shall enjoy full protection and security in the territory of the other Contracting Party.</p> <p>Each Contracting Party shall ensure that the management, maintenance, use, enjoyment or disposal, in its territory, of investments by investors of the other Contracting Party, is not in any way impaired by unjustifiable or discriminatory measures.</p>	<p>Investments of investors of either Contracting Party shall at all times be accorded fair and equitable treatment and shall enjoy full protection and security in the territory of the other Contracting Party.</p> <p>Neither Contracting Party shall in any way impair by unreasonable or discriminatory measures the management, maintenance, use, enjoyment or disposal of investments in its territory of investors of the other Contracting Party</p>	<p>Investments and activities associated with investments of investors of either Contracting Party shall be accorded fair and equitable treatment and shall enjoy protection in the territory of the other Contracting Party.</p> <p>Neither Contracting Party shall in any way impair by unreasonable or discriminatory measures the management, maintenance, use, enjoyment or disposal of investments in its territory of investors of the other Contracting Party.</p>

<p>Most-favoured nation and national treatment provisions</p>	<p>Each Contracting Party shall in its territory accord to investments made by investors of the other Contracting Party fair and equitable treatment which in no case shall be less favourable than that accorded to its own investors or to investors of any third state, whichever is the more favourable from the point of view of the investor.</p> <p>Each Contracting Party shall in its territory accord investors of the other Contracting Party, as regards their management, maintenance, use, enjoyment or disposal of their investment, fair and equitable treatment which in no case shall be less favourable than that accorded to its own investors or to investors of any third State, whichever of these standards is the more favourable from the point of view of the investor.</p>	<p>The host Party shall in its territory subject investments by investors of the other Contracting Party to treatment no less favourable than that which it accords to investments of its own investors or to investments of investors of any third State.</p> <p>The host Party shall in its territory subject investors of the other Contracting Party, as regards the management, use, enjoyment or disposal of their investments, to treatment no less favourable than that which it accords to its own investors or to investors of any third State.</p>	<p>Each Contracting Party shall accord to investments, made in its territory by investors of the other Contracting Party, treatment not less favourable than that which it accords to investments of its own investors or to investments of investors of any third State, whichever is more favourable.</p> <p>Each Contracting Party shall accord to investors of the other Contracting Party, as regards their activity in connection with investments in its territory, treatment not less favourable than that which it accords to its own investors or to investors of any third State, whichever is more favourable.</p>	<p>Each Contracting Party shall in its territory accord to investments and returns of investors of the other Contracting Party treatment not less favourable than that which it accords to investments and returns of its own investors or of investors of any third State.</p> <p>Each Contracting Party shall in its territory accord to investors of the other Contracting Party as regards management, maintenance, use, enjoyment of disposal of their investment not less favourable than that which it accords to its own investors or to the investors of any third State.</p>	<p>The treatment and protection referred in this BIT shall not be less favourable than that accorded to investments and activities associated with such investments of investors of a third State.</p> <p>Without prejudice to its laws and regulations, each Contracting Party shall accord to investments and activities associated with such investments by the investors of the other Contracting Party treatment not less favourable than that accorded to the investments and associated activities by its own investors.</p>
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<p>Protection from expropriation and compensation for expropriation</p>	<p>Investments of investors of each Contracting Party shall not be nationalized, expropriated or subjected to measures having effect equivalent to nationalisation or expropriation (hereinafter referred to as "expropriation") in the territory of the other Contracting Party except for expropriations made in the public interest, on a basis of non-discrimination, carried out under due process of law, and against prompt, adequate and effective compensation.</p> <p>Such compensation shall amount to the fair market value of the investment expropriated immediately before the expropriation or impending expropriation became known in such a way as to affect the value of the investment.</p>	<p>Investments by investors of one Contracting Party in the territory of the host Party shall not be nationalised, expropriated or subjected to measures having the same effect except in the public interest on a non-discriminatory basis.</p> <p>The measures shall be carried out under due process of law and shall be accompanied by prompt, adequate and effective compensation.</p> <p>Such compensation shall amount to the fair market value of the investment expropriated at the time immediately before the expropriation or impending expropriation became public knowledge in such a way as to affect the value of the investment.</p>	<p>Investments by investors of either Contracting Party in the territory of the other Contracting Party, shall not be expropriated, nationalized or subjected to any other measure the effects of which would be tantamount to expropriation or nationalization, except in the public interest, under due process of law, on a non-discriminatory basis and against payment of prompt, adequate and effective compensation.</p> <p>Such compensation shall amount to the market value of the investment affected immediately before the actual measure was taken or became public knowledge, whichever is the earlier, it shall include interest from the date of expropriation until the date of payment at a normal commercial rate and shall be freely transferable in a freely convertible currency.</p>	<p>Investments of investors of either Contracting Party shall not be nationalized, expropriated or subjected to measures having effect equivalent to nationalization or expropriation in the territory of the other Contracting Party except for a public purpose, under due process of law, on a non-discriminatory basis and provided that it is accompanied by prompt, adequate and effective compensation.</p> <p>Such compensation shall amount to the market value of the investment expropriated immediately before the expropriatory action was taken or impending expropriation became public knowledge, whichever is the earlier, shall include interest from the date of expropriation at a normal commercial rate and shall be made without undue delay, be effectively realizable and be freely transferable.</p> <p>The investor of one Contracting Party claiming that all or part of his or its investment has been expropriated shall have a right to prompt review by a judicial or other independent authority of the other Contracting Party, of his or its case and of the valuation of his or its investment in accordance with the principles relating to prompt, adequate and effective compensation.</p>	<p>Investments of investors of either Contracting Party shall not be nationalized expropriated, or subjected to measures having effects equivalent to nationalization or expropriation in the territory of the other Contracting Party except for public purposes, under domestic legal procedure, on a non-discriminatory basis and against compensation.</p> <p>Such compensation shall be at least equal to the market value of the investment expropriated immediately before the expropriation or before the impending expropriation became public knowledge, whichever is the earlier, shall include interest at a normal commercial rate until the date of payment, shall be made without delay, and be effectively realizable.</p>
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Exceptions	Does not apply to advantages as a result of development finance institutions, in terms of regional economic integration, customs union or taxation agreements.	Provisions do not apply to advantages as a result of regional economic organisation or customs union, taxation agreements, development finance institutions.	Provisions do not apply to advantages as a result of customs union, regional economic integration, economic union, taxation agreements, or development finance institutions.	Provisions do not apply to benefits as a result of existing or future customs union, free trade area, common external tariff area, monetary union or similar, development finance institutions, taxation agreements.	Provisions not apply to benefits arising from customs union, free trade area, common market and any similar or interim agreement, frontier trade agreement, taxation arrangement or development finance assistance.
Investor/state dispute settlement	Disputes may be submitted to international arbitration by the International Centre for Settlement of Investment Disputes established pursuant to the Convention on the Settlement of Investment Disputes between States and Nationals of other States, the Additional Facility for the Administration of Conciliation, Arbitration and Fact-finding Proceedings; or an international ad hoc arbitral tribunal established under the Arbitration Rules of the United Nations Commission on International Trade Law.	Disputes may be submitted to the International Centre for Settlement of Investment Disputes (ICSID), established pursuant to the Convention on the Settlement of Investment Disputes between States and Nationals of other States, opened for signature at Washington on 18 March 1965; or to an ad hoc arbitration tribunal, which unless otherwise agreed upon by the parties to the dispute, is to be established under the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL), the Additional Facility for the Administration of Proceedings by the Secretariat of ICSID.	May submit dispute either to Competent courts of the contracting party in the territory of which the investment has been made or to international arbitration, either the International Centre for the Settlement of Investment Disputes, established under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States. opened for signature at Washington D.C. on 18 March 1965. when each Contracting Party has become a party to said Convention, under the rules governing the Additional Facility for the Administration of Proceedings by the Secretariat of ICSID; or an ad hoc arbitral tribunal to be established under the arbitration rules of the United Nations Commission on International Trade Law (U.N.C.I.T.R.A.L.) or any other international arbitration or an ad hoc arbitration tribunal as agreed between the parties to the dispute.	Local remedies under the laws and regulations of the Contracting Party in whose territory the investment is made are available. If the dispute cannot be settled in 6 months: it shall be submitted upon request of either the investor or the Contracting Party to either; the International Centre for the Settlement of Investment Disputes (ICSID), established pursuant to the Convention on the Settlement of Investment Disputes between States and Nationals of other States, opened for signature in Washing D.C. on 18 March 1965; or an ad hoc arbitral tribunal which, unless otherwise agreed upon by the parties to the dispute, shall be established under the arbitration rules of the United Nations Commission on International Trade Law(UNCITRAL), the dispute may be settled under the rules governing the Additional Facility for the Administration of Proceedings by the Secretariat of the International Centre for Settlement of Investment Disputes.	If the dispute cannot the settled through negotiations within six months, either Party to the dispute shall be entitled to submit the dispute to an international arbitral tribunal provided that the Contracting Party involved in the dispute may require the investor to initiate administrative review procedures in accordance with its laws and regulations, and provided that the investor has not submitted the dispute to a domestic court of that Contracting Party.

Sunset clause	In respect of investments made prior to termination, continues in effect for 10 years.	In respect of investments made prior to termination, continues in effect for 20 years.	In respect of investments made prior to termination, continues in effect for 10 years.	In respect of investments made prior to termination, continues in effect for 20 years.	In respect of investments made prior to termination, continues in effect for 10 years.
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Provisions relating to	Iran	Mauritius	Nigeria
Signature date	03-Nov-97	Undated	29-Apr-00
Application to investments made before entry into of BIT	BIT applies to investments made before or after entry into force.	BIT applies to all investments, whether made before or after the entry into force of the BIT.	BIT applies to all investments, whether made before or after the date of entry into force of the BIT.
Fair and equitable treatment	Investments and proceeds of investors of either Contracting Party effected within the territory of the other Contracting Party, shall receive the host Contracting Party's full legal protection and fair treatment not less favourable than that accorded to its own investors or to investors of any third state who are in a comparable situation.	Investments and returns of investors of either Contracting Party shall at all times be accorded fair and equitable treatment and shall enjoy full protection in the territory of the other Contracting Party. Neither Contracting Party shall in any way impair by unreasonable or discriminatory measures the management, maintenance, use, enjoyment or disposal of investments in its territory of investors of the other Contracting Party.	Investments and returns of investors of either Party shall at all times be accorded fair and equitable treatment and shall enjoy full protection in the territory of the other Party. Neither Party shall in any way impair by unreasonable or discriminatory measures the management, maintenance, use, enjoyment or disposal of investments in its territory of investors of the other Party.
Most-favoured nation and national treatment provisions	Investments and proceeds of investors of either Contracting Party effected within the territory of the other Contracting Party, shall receive the host Contracting Party's full legal protection and fair treatment not less favourable than that accorded to its own investors or to investors of any third state who are in a comparable situation.	Each Contracting Party shall in its territory accord to investments and returns of investors of the other Contracting Party treatment not less favourable than that which it accords to investments and returns of its own investors or to investments and returns of investors of any third State. Each Contracting Party shall in its territory accord to investors of the other Contracting Party treatment not less favourable than that which it accords to its own investors or to investors of any third State.	Each Party shall in its territory accord to investments and returns of investors of the other Party treatment not less favourable than that which it accords to investments and returns of its own investors or to investments and returns of investors of any third State. Each Party shall in its territory accord to investors of the other Party treatment not less favourable than that which it accords to its own investors or to investors of any third State.

Protection from expropriation and compensation for expropriation	<p>Investments of investors of either Contracting Party shall not be nationalized, confiscated, expropriated or subjected to similar measures by the other Contracting Party unless if such measures are taken for public purposes, in accordance with due process of law, in a non-discriminatory manner and upon payment of prompt, effective and appropriate compensation.</p> <p>The amount of compensation shall be equivalent to the value of the investment immediately before the action of nationalization, confiscation or expropriation was taken.</p>	<p>Investments of investors of either Contracting Party shall not be nationalised, expropriated or subjected to measures having effects equivalent to nationalisation or expropriation in the territory of the other Contracting Party except for public purposes, under due process of law, on a non-discriminatory basis and against prompt, adequate and effective compensation. Interest at a normal commercial rate shall be paid for undue delay in paying such compensation.</p> <p>The investor affected by the expropriation shall have a right, under the law of the Contracting Party making the expropriation, to prompt review, by a court of law or other independent and impartial forum of that Contracting Party, of the legality of the expropriation and of the valuation of his or its investment in accordance with the principles of prompt, adequate and effective compensation.</p>	<p>Investments of investors of either Party shall not be nationalised, expropriated or subjected to measures having effects equivalent to nationalisation or expropriation in the territory of the other Party except for public purposes, under due process of law, on a non-discriminatory basis and against payment of prompt, adequate and fair compensation.</p> <p>Such compensation shall be at least equal to the market value of the investment expropriated immediately before the expropriation or before the impending expropriation became public knowledge, whichever is the earlier, shall include interest at a normal commercial rate until the date of payment, shall be made without delay and shall be effectively realizable.</p> <p>The investor affected by the expropriation shall have a right, under the domestic law of the Party making the expropriation, to prompt review, by a court of law or other independent and impartial forum of that Party, of his or its case and of the valuation of his or its investment in accordance with the principles of prompt, adequate and fair compensation.</p>
Exceptions	<p>Provisions do not apply to benefits arising from a free trade area, customs union, common market or a similar regional institution or taxation arrangements.</p> <p>The provisions of Article 4 (protection of investments) shall not be construed so as to oblige the Republic of South Africa to extend to investors of the other Contracting Party the benefit of any treatment, preference or privilege resulting from:</p> <p>... Any law or other measure taken, pursuant to Article (9) of the Constitution of the Republic of South Africa, 1996 (Act 108, 1996) the purpose of which is to promote the achievement of equality in its territory, or designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination.</p>	<p>Provisions do not apply to benefits arising from existing or future customs union, free trade area, common market or similar international agreement, arrangements in respect of development financial institutions or taxation.</p> <p>Further, Contracting Parties are not obliged to extend to investors of the other Contracting Party the benefit of any treatment, preference or privilege resulting from...Any law or measure in pursuance of any law, the purpose of which is to promote the achievement of equality in its territory, or designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination in its territory.</p>	<p>Provisions do not apply to benefits arising from existing or future customs union, free trade area, common market or similar international agreement, arrangements in respect of development financial institutions or taxation.</p> <p>Further, Contracting Parties are not obliged to extend to investors of the other Contracting Party the benefit of any treatment, preference or privilege resulting from...Any law or measure in pursuance of any law, the purpose of which is to promote the achievement of equality in its territory, or designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination in its territory.</p>

Investor/state dispute settlement	Disputes to be submitted to arbitration. National courts do not have jurisdiction over any dispute referred to arbitration.	Disputes to be submitted to international arbitration, either to the International Centre for the Settlement of Investment Disputes (ICSID) established by the Convention on the Settlement of Investment Disputes between States and Nationals of other States, opened for signature at Washington DC on 18 March 1965, when each Contracting Party has become a party to said Convention; (As long as this requirement is not met, each Contracting Party agrees that the dispute may be settled under the rules governing the Additional Facility for the Administration of Proceedings by the Secretariat of ICSID) or an international arbitrator or adhoc arbitration tribunal to be appointed by a special agreement or established under the Arbitration Rules of the United Nations Commission of International Trade Law.	Disputes to be submitted to international arbitration, either to the International Centre for the Settlement of Investment Disputes (ICSID) established by the Convention on the Settlement of Investment Disputes between States and Nationals of other States, opened for signature at Washington DC on 18 March 1965, when each Contracting Party has become a party to said Convention; (As long as this requirement is not met, each Contracting Party agrees that the dispute may be settled under the rules governing the Additional Facility for the Administration of Proceedings by the Secretariat of ICSID) or an international arbitrator or ad hoc arbitral tribunal to be established by agreement between the parties to the dispute.
Sunset clause	In respect of investments made prior to termination, continues in effect for 10 years.	In respect of investments made prior to termination, continues in effect for 20 years.	In respect of investments made prior to termination, continues in effect for 10 years.

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